Filed Oct. 30, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, *Appellant*,
v.
A. A. GRIMES ET AL. } No. 109.

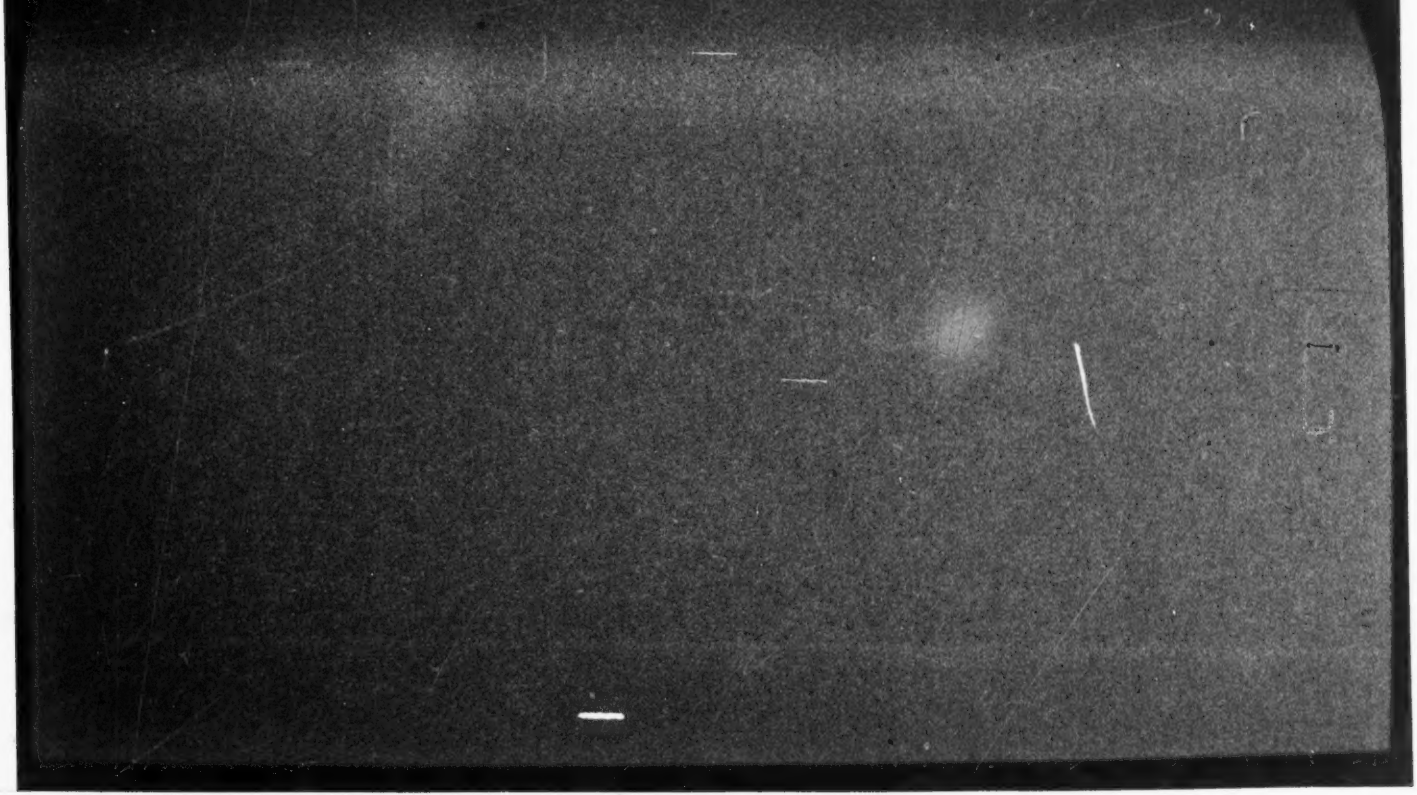
CHRISTIE ET AL., *Appellants*,
v.
THE UNITED STATES. } No. 129.

APPEALS FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF AND ARGUMENT.

ROCHESTER FORD,
Of Counsel for Claimants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1901



Supreme Court of the United States.

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THE UNITED STATES, *Appellant*, v. A. A. GREEN ET AL. } No. 109.

CHRISTIE ET AL., *Appellants*, v. THE UNITED STATES. } No. 129.

APPEALS FROM THE COURT OF PRIVATE LAND CLAIMS.

Statement of the Case.

The case of Green *v.* U. S. *et al.* was instituted by the filing of the petition of A. A. Green (rec., p. 1), showing that on the 15th day of May, 1825, the State of the West, in the Republic of Mexico, granted and conveyed to Ramon Romero that certain tract of land, now situated in the county of Pima, in the Territory of Arizona, known and designated as the "Rancho San Rafael de la Zanja," particularly bounded and described as follows: Commencing on the center of the tract at a place called at the time the grant was made "San Rafael," running thence northerly 200 cordels, being 2 leagues, to an oak tree marked with a cross cut thereon and a stone monument at the tree; thence easterly 200 cordels, being 2 leagues, to the northeasterly corner, marked by a heap of stones; thence southerly 400 cordels, being 4 leagues; thence westerly 400 cordels, being 4 leagues, to the southwesterly

corner, being on the Pacito de San Antonio, where there are two little hills; thence northerly 400 cordels, being 4 leagues, to a point on the Plumosa mountain; thence easterly 200 cordels, being 2 leagues, to the place of beginning.

The petition further recited that "the map hereto annexed shows the boundaries of said land, and the quantity thereof is 16 square leagues."

This description of the grant is meagre and inaccurate, but a fuller statement will appear later.

The United States filed an answer denying all the allegations on information and belief, and asking that the petition be dismissed (p. 3).

Colin Cameron, one of the defendants, filed his separate answer, in which he averred that he was the holder and possessor of said grant and all thereof; that he owned same by virtue of a grant title dated May 15, 1825, executed by Juan Miguel Riesgo, commissary general of the State of the West, in the name of the sovereign nation of the Mexican Republic; that the said land was sold and conveyed in fee after the proceedings of survey and valuation recited in the title papers, and that it was duly recorded in the archives of Mexico, and had been investigated by the surveyor general of Arizona and reported as genuine and recommended to Congress for confirmation to the extent of four square leagues.

The answer contained the following further allegation:

"Defendant further alleges that heretofore, to wit, on September 6, 1886, the United States of America, one of the defendants herein, brought suit against this defendant in the district court of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in circuit and district courts of the United States; that said suit was brought under the act of Congress approved February 25, 1885, entitled 'An act to prevent unlawful occupancy of the public lands,' and that the complaint in said suit alleged that this defendant had enclosed a large tract of

the public lands belonging to the United States of America subject to entry at the proper land office under the laws of the United States in such cases made and provided; that the lands so enclosed were in the first judicial district of the Territory of Arizona, in the county of Pima, and that the defendant had enclosed, as aforesaid, about 800 acres of the public lands without any title or claim or color of title acquired in good faith thereto, and without having first made application to acquire title thereto or of any part thereof according to law; that this defendant answered in said cause and averred that on May 15, 1825, the Republic of Mexico granted to one Ramon Romero and other citizens of Santa Cruz the tract of land known and described as the 'Rancho San Rafael de la Zanja,' the boundaries of which tract were fully and particularly described in said answer, which grant and tract of land was and is the same San Rafael de la Zanja grant owned by defendant as hereinbefore in his answer in this present case alleged; that this defendant further alleged in his answer in said cause that he was the owner of said land grant San Rafael de la Zanja, and that the enclosure referred to in the complaint therein was within the original boundaries of said grant as the same was surveyed by the Mexican authorities prior to the issuance of title to same, as said survey is set out in the original title paper of said grant.

"Defendant further alleges that said cause was thereafter tried by the court sitting without a jury, and evidence was therein introduced as to the ownership by this defendant of said grant and of the location of said enclosure, and of the location of each monument described in the testimonio of said grant, and findings of fact were made in said case, and in said case it was found and adjudicated that this defendant had succeeded to all the right, title and interest which Ramon Romero ever had in or to said grant, and had all such right, title and interest of Romero in said grant, and it was further found and adjudicated in said case that the fence maintained by this defendant was within the exterior boundaries of said grant as said boundaries were recited as measured in the expediente or title paper of said grant, being a mile and a quarter south of the northern boundary and four miles west of the eastern boundary of land recited as measured in said title paper; and it was further found and adjudicated in said case that the map

hereto attached as 'Exhibit A' is a correct representation of the land included within the boundaries described in the original title paper of said grant, and that said map correctly represents the location of each monument called for and described in said title paper, and defendant avers that the lands claimed by him are all the lands embraced within the original survey of said grant to the boundaries established and described therein, and that said lands are the lands embraced within the accompanying map of said grant, filed herewith as Exhibit 'A,' and that said monuments are located according to said map as follows:

"From south center monument at mouth of Potrero north eighty-four degrees ten minutes east four miles, six chains to the Jaralito; thence north thirty-five degrees east eight miles, ten chains to the east center monument; thence north two degrees forty minutes east nine miles, sixty-seven chains to the northeast corner monument; thence south eighty-seven degrees thirty minutes west nine miles, eight chains to the tree, being the north center monument; thence south eighty degrees fifteen minutes, west six miles, seventy-nine chains to the northwest monument; thence south eleven miles, thirty chains to the west center monument; thence south four degrees, thirty minutes east three miles, forty chains to the monument on San Antonio pass, being the southwest monument; thence north eighty-six degrees forty minutes west six miles to plac : of beginning; variation twelve degrees fifteen minutes east.

"And defendant pleads such findings of fact as to the monuments and location of said San Rafael de la Zanja grant as *res judicata* therein.

"Defendant further avers that all of the steps and proceedings in the matter of the grant and sale of said lands were regular, complete and lawful, and vested a perfect and valid title in fee thereto in the grantees of said grant, and that said grantees immediately after the survey of the said tract of land, as set out in the title papers of said grant, went into the actual possession, use and occupation of the whole of said tract of land, claiming title to the whole of said tract of land to the monuments described therein; that said grantees and their successors in interest have continuously remained in possession of all of said tract of land under such claim of title from the survey of said

tract to the present time, and were in the open and exclusive and peaceable possession of all of said tract, claiming title to the whole of same, at the time of the treaty between the Republic of Mexico and the United States of America; that said grant documents constitute a complete and definitive grant in fee by way of sale, coupled with the condition subsequent not to abandon the same for a longer period than three years without good reason, which would subject the tract to adjudication to third parties who might apply for or denounce the same; that no forfeiture of said grant was ever claimed, and that this defendant is entitled to a confirmation or recognition of his title to said grant in accordance with the metes and bounds set forth in the original survey and grant of the same; that said grant was not a grant by quantity, but was a sale by the metes and bounds and natural landmarks established by the said survey thereof made by the Spanish officials prior to the issuance of same, and that it vested in the grantees a perfect and valid title in fee to the whole of said tract so surveyed.

"Defendant further avers that prior to said treaty known as the Gadsden treaty, no resurvey of said grant had ever been applied for or ordered by any one, and that none of the grantees or their successors in interest had, prior to said treaty, any knowledge or notice that within the said monuments there was any excess of land over the area stated in said title papers, and defendant avers that the grantees under said grant were, under the laws of Mexico and the State of Sonora existing at the date of said treaty, and for a long time prior thereto had been, holders in good faith of any such excess or surplus, if any such there is, and entitled to occupy and retain the same as owners even after such overplus is shown, without other obligations than to pay for the excess according to the quality of the land and the price that governed when it was surveyed and appraised; and defendant further avers that if this honorable court should decide that said sale as recited in said title papers did not, as defendant avers it did, convey to the grantees therein all of the said tract of land to the monuments described in said title papers without further payment therefor, he is ready and willing and now offers to pay to the United States of America any amount that may be found to be due from him for such overplus, and also the costs for ascertaining the

same, as soon as the amount of the same and the sum due therefor is ascertained.

"Wherefore defendant now tenders to the United States of America, and offers to deposit with the clerk of this honorable court for the United States of America, the sum of $1,359.00 in gold coin of the United States of America as payment for all such overplus or surplus of said lands in said grant, according to their quality and the price which governed when it was surveyed and appraised, and the further sum of $200 in like gold coin for the costs of ascertaining and determining the existence or non-existence of such overplus, and prays that this court order the clerk of said court to accept said sum as such tender, and, as aforesaid, offers to pay said amount or any amount which may by this honorable court be adjudged to be due for any such overplus or surplus, and prays that upon said payment this honorable court decree that defendant is entitled to and is the owner of all of said tract of land as originally surveyed, including said overplus or surplus, and that by said decree he be secured in the ownership and possession of the whole of said tract, and defendant, answering herein by reason of the fact that he has been made a party defendant, prays that the validity of his said title may be inquired into and decided, and that his title to all of said lands be declared valid, and that the said grant be adjudged to be and always to have been a complete and perfect and unconditional title in fee, and the defendant be adjudged to be the owner in fee thereof, and for such other and further relief as to the court may seem meet and proper in the premises."

One Harvey L. Christie, who was understood to assert some claim or title to the lands adverse to the United States, was by order of court (p. 12) made a party defendant, and filed a separate answer, claiming that he was the owner of the grant, and a similar averment as to a tender for any surplus that might be found in the grant (pp. 15, 16, 17).

On the trial claimants read and offered in evidence, without objection on the part of the United States, a certified copy of the expediente or matrix of the San Rafael de la Zanja grant under the certificate of the treasurer general of the State of Sonora, and also the original titulo or title to the

grant (rec., pp. 18, 525). Certain deeds showing deraignment of title and several other documents, the effect of which will be set out in the argument herein, were offered also (pp. 19, 33–64, 385, 446, *et passim*).

A summary of the expediente or title of this grant was given by this court in the case of Cameron *v.* U. S., 148 U. S., 301, in which the court said that the expediente appears to have been obtained in the following manner:

"On July 19, 1821, Don Manuel Bustillo applied to the governor intendente of Sonora and Sinaloa to purchase at auction four square leagues of land for the raising of stock at the place named, de la Zanja, 'three square leagues of land (*tres sitios de tierra*) in the same presidio in which I reside and outside of the boundaries thereof and on the side of the north, and one square more (*un sitio mas*) for an "estancia" in the place of the "cajoncito" on the side of the east;' and prayed for a measurement of the land by the proper officers, and for a valuation of the same. Upon this petition the intendente ordered a measurement of the lands, summoning the adjacent land-owners and appointing appraisers for the valuation of the land, publication to be made for thirty days for the purpose of soliciting bidders. The measurements were made (the details of which are fully set forth), from a central point named San Rafael two leagues in each direction—*i. e.*, to the four points of the compass—and monuments were put up on the four corners of the square as well as in the center of the four exterior lines. All these monuments were placed at the times the lands were measured under the authority of the government. The monuments included four leagues square, or sixteen square leagues.

"Upon the completion of this survey, the lands were valued at $60 each for the three square leagues, for the reason that they contained permanent water, and the remaining square leagues at $30, for the reason that it contained no water, except as is furnished by wells. The land was thereupon put up at auction, and after some spirited bidding between Bustillo and Romero, was struck off to the latter for $1,200 and the grant made to him by the proper officer in the name of the Mexican Republic, in which the land was described as four square leagues for the raising of cattle

(*cuatro sitios de tierra para cria de ganada major*), included in the place called 'San Rafael de la Zanja,' situated in the jurisdiction of the presidio of Santa Cruz, to Don Ramon Romero and other citizens (*vecinos*) interested. The grantees were also required to confine themselves within their respective limits, 'which are to be designated by monuments of lime and stone' (*mojoneras de cal y canto*), and were guaranteed the free enjoyment and quiet and peaceful possession of said lands."

As to the books of toma de razon, or record of grants, now existing in the archives at Hermosillo, it was proved (rec., p. 92) that there are only two, "one a very small book, with not over a dozen leaves in it, dated somewhere about 1824 or 1825, and the other a much larger book, beginning some time in the 30's."

Evidence was introduced by claimants as to the location and existence of the permanent water and the natural objects and monuments called for in the grant, and opposing evidence by the United States, which evidence will be set out and its effect and weight referred in the argument. It was found that the measurements had not been accurately made, and whereas the tract would have included four leagues square, or sixteen square leagues (so called), if the officials had measured exactly two leagues in each direction from the central point, in view of the inaccuracy of the measurements and the fact that a number of the distances were estimated on account of the roughness of the tract of land, the monuments as a matter of fact include more than four leagues square.

The majority of the lower court entered a decree "confirming the grant to the extent of four sitios, the same to be measured in a square from the center established by the Mexican surveyor who made the original survey."

Two of the judges dissented on the ground that the grant had not been recorded in accordance with the provisions of the treaty.

Appeals were taken both by the United States and by claimants and duly prosecuted to this court.

SPECIFICATION OF ERRORS.

The court erred in refusing to confirm this grant for all the land contained within the monuments of the original survey.

POINTS AND AUTHORITIES.

I.

Lands measured as this grant was, to wit, 200 cords or two leagues in each direction from the center, were said to contain "four leagues."

See order of Pedro de Nava, October 22, 1791, Reynolds, p. 62.

II.

The survey of this grant was for the purpose of segregating the land applied for and afterwards sold, and the purchasers acquired title to the whole of the surveyed tract. The delivery of juridical possession immediately after and in accordance with the calls of the survey fixes the boundaries of the land sold.

See title papers.

III.

Grants in Sonora were not like the grants by quantity, or floating grants, of California, but were located tracts of land identified and segregated by the survey preceding the sale. The object of the survey was to mark the boundaries of the land sold, and the purchasers acquired title to the specific tract so designated. The delivery of the title in pursuance

of the survey was the investiture of a complete title to the specified tract, with no future act to be performed.

See title papers.

See opinion of Justice Sluss in case No. 143, October term, 1901, of this court, Arivaca Land and Cattle Company *v.* U. S.

Spaulding on Public Lands, sec. 511.

IV.

The title papers of this grant and the documents set out in the record herein show that the purchasers did not wait for the delivery of the title papers before going into possession, but went into possession of the whole of the surveyed tract immediately after and by virtue of the survey, and at least nine years before the delivery of the title. This was an official or juridical delivery of possession of the tract, and established its boundaries as those marked by the survey.

See record, pp. 449 and 532.

Pico *v.* U. S., 5 Wall., 536.

Graham *v.* U. S., 4 Wall., 259.

Maxwell land grant case, 121 U. S., 325, 369–373.

V.

This court has stated when this title was before it in a former case that "the limits of this grant were to be designated by monuments of lime and stone; that such designation was actually made; and that juridical possession of the land was delivered in pursuance thereof."

Cameron *v.* U. S., 148 U. S., 301, at p. 309.

VI.

The land sold in this grant was appraised and sold as to its quality, namely, three squares or quarters containing permanent water and the remaining square to be made use

of by a well. The evidence shows that the tract as surveyed does contain three quarters each with permanent water, and the remaining quarter without such water, and further shows that if the measurements are shortened so as to include only four leagues (as the words are commonly used), or even four leagues square, neither of such tracts will include the permanent water, and the grant will be of little, if any, value.

Rec., pp. 144–161.

VII.

The testimony shows that the purchasers at the time went into possession of and occupied the whole of the tract embraced within the original monuments, claiming title and ownership of all of the land. The practical construction thus given to the grant at the time is evidence that the intent of the parties was to acquire the whole tract.

Rec., pp. 206, 208, 209.

Topliff *v.* Topliff, 122 U. S., 121.

This practical interpretation by the parties themselves is entitled to great, if not controlling, influence.

VIII.

The price paid for this tract of land, taken in connection with the prices for which land of the same quality sold in the same vicinity at the same time, shows that the purchasers were not buying four leagues (as the words are commonly used) but the whole tract.

IX.

Where, in Sonora, questions of excess arose in grants, due to inaccurate measurements or computations, the remedy was by a further payment by the grantee, and not by a cur-

tailment of the land surveyed, and the claimants of this grant are by virtue of their tender, as disclosed by the record herein, entitled to any surplus.

Law of Sonora of May 12, 1835.

X.

The grant was duly recorded in pursuance of the Mexican laws and customs.

Applegate *v.* Lexington & Carter County Mining Co., 117 U. S., 250.

Stebbins *v.* Duncan, 108 U. S., 32, 50.

Record, pp. 91, 92, and 233, 234.

ARGUMENT.

At the very outset of this case we find an apparent difference between it and the others which have come before the court. This difference consists in the fact that the measurements, if accurately made, would contain four times the quantity called for (using the word sitios in the generally accepted meaning), while in the other grants the measurements, if accurately made, would contain the exact quantity called for. The quantity is spoken of "four leagues," whereas the monuments include four leagues square, or sixteen square leagues, as we use the word.

A league, or sitio, as generally understood, is a tract of land whose height multiplied by its width will give an area of 10,000 square cords, or 4,338.464 acres. Four sitios would contain an area of 40,000 square cords, or approximately 17,372 acres. Four square leagues (as commonly understood) would be laid off by measuring a square one league, or 100 cords, from a central point in each direction, thus giving a tract of land 200 cords on each side, and if not measured in the form of a square it would be a rectangle,

the height of which, multiplied by the breadth, would equal 40,000 square cords. For instance, the Canoa grant passed on by this court in the case of Maish & Driscoll *v.* U. S., 171 U. S., p. 242, calls for four sitios, and the measurements disclose a figure 400 cords in height by 100 in width, containing 40,000 square cords. The San Rafael del Valle grant, passed on by this court in Camou *v.* U. S., 171 U. S. p. 277, called for four sitios, and was of the same height and width as the Canoa. The Sonoita grant, passed on in Ely's Adm'r *v.* U. S., 171 U. S., p. 220, called for one and three-quarters sitios, and the measurements disclosed a tract 50 cords wide by 375 in height, containing 17,750 square cords, or just one and three-quarters sitios according to the face of the papers.

These instances are given to show that the Mexican officials at the time the San Rafael grant was made possessed accurate knowledge of the area of a sitio and what measurements were required in order to give a tract of any required number of square leagues. The Spanish attorney general Perez, who, under date of December 20, 1821, reported that he had examined "with due attention" the expediente in this case, is the same official who, under date of November 7, 1821, had reported on the Sonoita proceedings, and on December 9, 1821, on the Canoa expediente, and the other officials in these various grants were the same, for the grants were made under the same laws and at the same time.

It would, therefore, seem wholly untenable, as well as most ungracious, to ascribe to these Mexican officials, especially in view of the proof to the contrary, such a degree of ignorance of their own laws and land measures as to suppose that they did not know that a tract of land 400 cords on a side would contain more than 40,000 square cords, or four leagues as generally understood by us. On reading this title paper it is apparent even to an American attorney that a tract of land 400 cords on a side would contain 160,000 square cords, or sixteen square leagues as we term

them. It would seem that no one can read the measurements without at once noting this apparent discrepancy between the terms of the grant and the survey that was made in pursuance of it. How then, it will be most naturally and pertinently asked, could the Spanish attorney general and other officials have failed to notice this mistake, if it was a mistake? The lower court held that the tract should have been measured 100 cords in each direction from the central point. When the Spanish attorney general read these proceedings, why did he not at once say, "the measurements do not give four leagues but sixteen leagues?" The proceedings of survey were placed before him for his opinion. When he gave it, there arose, as this court has termed it in other cases, "A very strong, if not irresistible presumption that everything preceding it had been lawfully and rightfully done." The report of the attorney general (p. 529) is that "he had examined with due attention this expediente of land surveyed, from which there resulted four sitios, which were appraised at the rate of $60 each for three of them, as they had running water, and $30 for the fourth as it had none, and could only be improved by wells." The Governor Intendente had finally approved the proceedings, stating that the foregoing proceedings of "measurement, appraisement and sale of the four square leagues were in all respects regular and sufficient." Nothing remained to be done except to pay the money.

Unless we are prepared to reverse the presumption above cited, and to hold that there was a mistake made in these measurements, and that the attorney general and all the other officials were too ignorant to detect this mistake, we are forced to take the language as it is and to say that the four sitios referred to were the four square figures or quarters formed by the survey, each of which was 200 cords on a side, and each of which was in this grant called a sitio. The language of the grant is not explainable under any other theory, but under this construction it is clear and un-

ambiguous. There resulted from the survey four quarters or squares or sitios. The tract of land surveyed was uniformly spoken of as containing four sitios or squares. Moreover, these sitios were particularly identified from the fact that three of them contained running water and the fourth or remaining one could be improved only by wells, which three wet sitios or squares, together with the remaining dry sitio, comprise the whole of the tract as it is constantly referred to.

It will furthermore be shown by an examination of the evidence that this theory is in correspondence with the physical condition of the country, and that taking the four squares into which the survey was divided by the measurements made 200 cords from the central point, three of them are found to contain running water and the fourth is used only by means of a well, and it is highly significant that this dry sitio has had on it from the time the purchasers took possession of this grant a settlement called "La Noria," or The Well, thus showing that it is the dry sitio mentioned in the title.

The holding in the Ely's Admr. case, *supra*, was that where there are measurements which, if accurately made, would comprise the quantity called for, the measurements should now be made accurately, as it may be presumed it was the intention to do at the time. If this rule were applied to the present case, the court would hold that this grant should be confirmed for a tract of land measured accurately 200 cords in each direction from the central point. We will endeavor to show that the facts in this case are so different from the Ely case that a different decision must be called for herein. But this court did not hold, nor has any court ever held, that the mention of quantity alone is the controlling consideration. Where there is a difference (if it should be thought that there is a discrepancy in this case) between the quantity and the survey actually made, it

is submitted as unquestioned law that the survey must control.

Our theory above set out, that the four sitios referred to herein must mean the four squares of 200 cords each, seems to us probable and rational, but we are not left solely to our theory or construction of this grant. On the contrary, we have evidence of the highest order that grants measured as this one was were said to contain "four leagues," and that the apparent discrepancy arises only because the Spanish idiom is different from ours. The court is referred to the order of Pedro de Nava of October 22, 1791, appearing on page 62 of Reynold's Spanish and Mexican Land Laws, as follows:

"CHIHUAHUA, *October* 22, 1791.

"In accordance with the opinion of the assessor of this Commandancy General, I have resolved by decree of today, that, notwithstanding the provisions of Article 81 of the ordinance of Intendants, it belongs to the captains of presidios to sell and apportion lots and lands to the soldiers and residents who apply for them to establish their residence thereon.

"Considering sufficient for the new settlements that are being formed under their protection, the boundary of four common leagues, measured from the center of the plaza of the Presidio, two to each wind, I have also determined, in order to avoid doubts and appeals in the future, that the Captains limit themselves hereafter in the concession of grants of lots and lands to those that shall be included in said four leagues, without their being increased in any manner, leaving free and operative the exclusive jurisdiction that belongs to the Intendants of the Royal Treasury for the sale, composition and apportionment of the other lands in their respective districts.

"That this order may be punctually complied with and observed, you will circulate it to the Captains and Commandants of the Presidios in that province, giving me notice of having done it.

"God preserve you many years.

"PEDRO DE NAVA."

This San Rafael grant was made in precisely the same way as the settlements referred to in the foregoing order, namely, two leagues from a central point to each wind, and as the Spanish call the result of such measurements four leagues, instead of sixteen leagues square, as we should term it, it is quite reasonable and probable that the same words had the same meaning in the grant under consideration.

The confusion between square leagues and leagues square was not uncommon in the department of California and other parts of Mexico. In U. S. *v.* Pacheco, 22 How., 225, the call was for "two square leagues," but, as shown by the opinion of the court therein, the plan presented by the party and referred to in the grant showed, when taken in connection with the evidence of witnesses explaining its contents, that the body of land petitioned for and granted was something more than two leagues long and about two leagues wide, and the court held that "nothing could be more manifest than that the grant was intended to give a rancho of at least two leagues on each side line, making four leagues in superficies," or two leagues square. To find the true quantity intended to be granted, the court said it was bound to give due weight to the plan or map, and as the call for two square leagues and the map were inconsistent and plainly contradicted each other, and the adoption of the one must necessarily reject the other, the court considered the map as controlling.

We think this case very similar to the present one. Even if the apparent discrepancy as to four leagues is not completely explained by the use of the term as shown in Nava's order, and it should be considered that there is a conflict between the call for four square leagues and the survey, then the survey will have precedence over the mere designation of quantity.

A question that persistently arises in this case is, If the officials intended to convey a tract which would be 100 cords from the center in each direction (40,000 square cords), why

did they not survey such a tract at the time, and if the surveying officials were so ignorant as to make an error, why was it not corrected by the attorney general when he passed on the proceedings?

We submit:

First. They did not intend to convey a tract 100 cords in each direction from the center because they did not survey such a tract, and there is no room for theorizing that they intended to do something wholly different from what they did do.

Second. They did not intend to convey an unsurveyed four sitios (40,000 square cords) within the boundaries of the tract which was actually surveyed and monumented, because the title papers absolutely state that the appraisement and sale was of all the surveyed lands, and not of a portion within the boundaries.

Third. It could not have been in their minds to convey four sitios (40,000 square cords) to be afterwards surveyed, because such proceeding or grant was unknown to the law. Lands in Sonora could be sold only after they had been surveyed and appraised. A grant of an unsurveyed quantity to be located by means of a subsequent survey was never heard of in what is now Sonora and Arizona.

In view of the light that has been thrown on the subject of these Sonora grants during the many years of their pendency before the lower court and this court, it is believed that entirely accurate statements can now be made both as to the written laws of Mexico governing them and also as to the interpretation of such laws as shown by the practical construction of the Mexican officials. In an important respect the Sonora grants differ radically from the grants made in California, known as grants by quantity, or floating grants. In those grants the donee went into possession of an unsur-

veyed tract of land, designated only by its general boundaries, and the particular quantity granted to him was thereafter surveyed and segregated out of this tract. The California title papers provided that the proper magistrate should cause the quantity to be surveyed, and the statement was generally added that the surplus was "reserved to the nation for its convenient use." But in the Sonora grants the survey and segregation and possession thereunder in every case preceded the sale of the land and the delivery of the title papers. Where a person acquires title to land, of course the land must at some time be identified on the earth's surface. The private property of the purchaser must be separated from the public domain, which was done by a survey and monumenting of the land so donated in California or sold in Sonora. When, in California, the survey was afterwards made, "by this proceeding—called in the language of the country the delivery of juridical possession—the land granted was separated from the public domain, and what was previously a grant of quantity became a grant of a specific tract" (U. S. *v.* Graham, 4 Wall., 259; Malarin *v.* U. S., 1 Wall., 289; U. S. *v.* Pico, 5 Wall., 536). The very object of the survey preceding the delivery of possession was to turn the grant of quantity into one of a specific tract, which thereupon became private property.

The object of the surveys set out in the Sonora grants was exactly the same as this, and the effect exactly the same, viz., to identify on the earth's surface the land which was appraised and sold and delivered to the purchaser and possessed and held by him as his private property. The quality of the land determined its price, and the survey determined what sitios contained running water and what were dry, thus fixing the quality as well as quantity.

It is true that in making the surveys great errors as to distances, and therefore as to areas, were made, as is shown by later surveys, but this fact does not throw any doubt on

what was the intention of the parties. No early survey was accurate, either in California or Sonora or in Kentucky in the early day, and no survey can be accurate in a rough and mountainous country when many of the distances are estimated, and when those who make the measurements and computations are destitute of any surveying skill.

How such mistakes as to quantity should be corrected is a different question and will be discussed later. What we are now urging is that the grant itself was of the land as surveyed. It was a designation on the earth's surface of the quantity intended to be sold, and was the final act of the government conveying title to the tract without any further act to be performed.

Suppose that there was a grant by quantity in California of, say, four leagues, and that afterwards the proper officer surveyed the four leagues and established the boundaries thereof, and went through all the formalities of the delivery of juridical possession, so that what was formerly a grant of quantity became a grant of the specific tract so delivered, and further suppose, as must have been true in every instance, that in measuring the tract, in order to deliver juridical possession thereof, mistakes were made, so that the tract delivered was, in fact, much greater than four leagues. We have in other briefs cited, regarding the inaccuracy of Mexican surveys, what this court said in U. S. *v.* Billings, 2 Wall., 444, at page 447: "Perhaps the province of California at that time (1839) could not furnish a man capable of making an accurate survey," and also the language of the court in Noe *v.* U. S., 1 Hoff Land Cases, 162–169, referring to an estimate of the contents of a tract of land: "This is perhaps as close an approximation to the real quantity as often occurred under the loose and inaccurate ideas of the extent of land formed by the former inhabitants of this country." It is notorious that the quantity of land within the natural boundaries of Mexican grants often far exceeded the estimate of the surveyor, but this cir-

cumstance did not restrict the language of the grant or change the boundaries or the intention of the parties (White *v.* Burnley, 20 How., 247).

If such a tract of which juridical possession was delivered was found to contain more than the quantity of four leagues, could it be urged that it was not intended to deliver possession of the whole tract, or that the grantee did not acquire title to all of it? If this were urged, the answer would be that the very object of the proceeding of survey and juridical possession was to mark out and segregate a tract, intended and supposed to contain the exact quantity, and that the whole of the surveyed tract passed to the grantee. The argument that the whole of a tract could not pass to the purchaser because it was inaccurately surveyed, would put it out of the power of the Mexican government to sell and convey title to all of the land, whether it be more or less, within the boundaries established, because of the fact that it did not lie within human power to estimate the area within those boundaries correctly.

The above reasoning applies to the Sonora grants. The applicant petitioned for a quantity of land, but this was not all of his petition. His petition was not for an unidentified, unsurveyed quantity. On the contrary, his petition further requested that the government should cause this quantity to be surveyed and appraised and the other formalities gone through with so that the quantity which he applied for might be designated on the earth's surface. He was a practical man engaged in raising cattle, and it was essential that the government should survey off to him on the earth's surface the land which became his, so that he might know where his corner monuments were and might be able to say, "My land runs from this point to that because it has been surveyed by the government and those points have been designated as my boundaries." He could thus keep others off from his land and ask to be protected in the possession of that which was his.

The proceedings following the presentation of the application were for the very purpose of carrying out the request of the applicant and of segregating and selling to him the land which he asked for when he stated that he "needed a tract of land" for his stock It does seem unreasonable even to suggest that the survey was made for any other object than this.

Every order made from beginning to end of the proceedings shows that this was the object and the sole object of the survey. In accordance with the prayer of the petitioner in this grant (p. 526), that the "usual order be issued for the survey of said land"—that is, of the land which was registered—an order was made that "the commandant will proceed to make the survey of the lands registered by the applicant, summon the owners of coterminous lands, and appoint expert appraisers to make fair valuation thereof, which he shall publish for thirty consecutive days in solicitation of bidders, and shall take all the usual proceedings until the expediente is in condition for the final sale." The commissioner "to begin the survey of the four sitios for breeding cattle denounced by Bustillo" began the survey, continued it, and finished it with the statement that "with which survey was formed the square of the four sitios registered by Don Manuel Bustillo for breeding cattle, who accepted the same, and was cautioned that he must at the first opportunity mark his boundaries with monuments of stone and mortar as provided."

"The square of the four sitios" means simply that the lines were run connecting the four corners so as to complete the survey. Sometimes these exterior squaring lines were run, as in this case, whereas in other cases this part of the survey was omitted.

The language of the appraisement is peculiarly clear (p. 509):

"Thereupon said commandant proceeded to the corresponding appraisement by intelligent experts, who under

formal oath made in accordance with the knowledge they had of all the land, and with the superior disposition on the matter, giving a valuation of $60 to each of the three sitios that have permanent water, and $30 to the other one, as it is susceptible of improvement by wells. With this fair valuation the commandant of Santa Cruz published said four sitios for the term of thirty consecutive days in solicitation of bidders."

It was "*all* the land" that was appraised, and *all* the land consisted of three sitios with running water and "the other one" that was dry. Can any one in good faith urge or even suggest that the appraisement was only of a small part of the tract and of an unsurveyed and unidentified part?

Testimony was taken that the applicant had "sufficient stock to keep the land stocked and protected," and an order was made to sell the land and payment therefor was acknowledged, all the proceedings referring absolutely to the surveyed tract.

At this point it is proper to call the attention of the court to the important fact that possession was taken under and by virtue of the survey, and according to the boundaries established by it, and was not deferred till the delivery of the grant title. The records show in many cases that, as in this case, after payment was made for the land, the purchaser did not receive his formal title for several years. He was in possession by virtue of the delivery of the land to him after the survey and his payment therefor, and was in no hurry to take out the formal title, evidently because he had to pay a further fee, which he deferred as long as possible.

The express proof that this was true in this case is shown by the document on page 532 of the record herein, where, under date of January 16, 1831, the purchaser, Ramon Romero, was requested to pay for and receive the formal title to his lands, which had been sold to him and the other

residents on January 10, 1822. This document is in full as follows:

"ARIZPE, *January* 16, 1831.

"Mr. RAMON ROMERO.

"MY DEAR AND ESTEEMED SIR: The commissariat general of this State has entrusted to me the delivery, to the respective parties in interest, of various titles to the grant and confirmation of lands surveyed, appraised, sold and adjudicated by the treasury of the federation prior to the classification of revenues, upon previous payment of fifty dollars in fees due on each one of them; and that of the place called San Rafael de la Zanja, which was knocked down to you and the other residents of that presidio on the 10th of January, 1822, being among said titles, I inform you thereof that you may be pleased to take it out of the section of the treasury under my charge as soon as possible, as is requested by your attentive, affectionate, obedient servant, who kisses your hands.

"J. M. M. [RUBRICA.]"

This document precludes the theory that there was to be any further survey or delivery of possession when or after the title paper was delivered. As will be seen by what follows, the grantees had been in possession from the time of the survey, and nothing remained for them to do except to pay the final fee and receive their title paper.

The document on page 449 shows that the purchaser took possession immediately after the survey and before the title was issued. This document is quite interesting and instructive, as giving the particulars of the sale. It contains the express statement that "I understand that until the title be issued to the said first parties, I must maintain their possession and control (of said lands) without permitting that any person in any manner may infringe upon said possession;" and also the statement "that until the title of the said land be issued to the residents, they must protect their possession and control thereof, which they hold by the adjustment and overbidding (best bid), which were approved by

the national treasurer of the Mexican Empire, and must not allow any person or anything to infringe upon their rights of possession, but keep them protected as is just and obligatory."

The original denouncer, Bustillo, had advanced the fees of the surveying and other officials and went into possession of the lands after the survey, but when he was outbid at the final sale, he turned over the possession to the purchasers and received back the sum which he had advanced, an itemized list of which is given (rec., p. 450), and the purchasers remained in possession for at any rate more than nine years before the grant title was delivered to them.

As we have heretofore shown, this survey and delivery of the tract as surveyed was the delivery of juridical possession as fully as such possession was delivered in the California grants.

In the case of Ainsa *v.* U. S., 161 U. S., p. 208, the court said that appellant's contention in that case that the grantee took all the public lands north of Casita "as one tract by metes and bounds, could be sustained only on proof of a determination of such metes and bounds by actual survey and delivery of possession accordingly."

These requirements are exactly complied with in the present grant. There was the actual survey, the determination of the metes and bounds, the monuments placed at the time the lands were measured under the authority of the government and the delivery of possession which the grantees of all the land took within those monuments.

It is apparent that juridical possession was delivered of the whole of this San Rafael tract as surveyed, and this court so held in construing this very title in Cameron *v.* U. S., 148 U. S., 301, where the language is, "While a grant of our square leagues in the place called San Rafael de la Zanja, standing alone, would appear to have been a grant of a certain quantity of land, when it appears by the same instrument that the limits of the grant were to be desig-

nated by monuments of lime and stone; that such designation was actually made; and that juridical possession of land was delivered in pursuance thereof; it is at least open to doubt whether it does not fall within the class of concessions by specific boundaries, as these grants are distinguished in U. S. *v.* McLaughlin, 127 U. S., 428," and the court further stated, referring to Fremont *v.* U. S., 58 U. S., 542, "as no survey in that case was made, it was held to be a grant of quantity only."

The survey is the controlling feature and the distinguishing test. If this were a grant by quantity it would not have been surveyed at the time. But the survey was expressly "of the four sitios for breeding cattle denounced by Bustillo," and the center of these sitios was fixed at the central point, and the corner monument established as stated. The grant is not one of a tract by name, nor is it one of an unsurveyed quantity, and there is only one other kind remaining, namely, a grant of a specific tract according to a prior survey.

Except on the theory that the survey was made to identify the land sold, why was a survey made at all? If the intent was to grant a tract measured 100 cords in each direction from the central point, why was not such a survey made at the time? When the survey herein referred to was made, if the surveyors had measured 100 cords in each direction from the central point and then stopped, they would have had a tract of four sitios (40,000 square cords). Did they go 100 cords further and measure a tract 200 cords in each direction from the central point, containing 16 sitios (as we term them), in order that they might afterwards go back and duplicate the work and measure 100 cords from the center in each direction, which could have been measured at the time with less labor than the 16 sitios were?

The beginning of the survey was made by fixing the central point, and the southwest corner was "beyond San An-

tonio pass, on two small hills that serve as the west corner of the lands of this presidio (of Santa Cruz), which point should serve as the corner monument *of these sitios* (p. 528)."

We invite the attention of the court to this explicit statement in connection with the other language of the grant. The center, as heretofore stated, was the center of the four sitios denounced by Bustillo, and the southwest corner is said to be the corner monument "*of these sitios.*" This language absolutely negatives any theory that the survey was a tract of land within which the four sitios were afterwards to be surveyed. As the southwest corner was the corner "*of these sitios,*" so the other corners were. The northeast corner monument was to be placed at the point of the Sierra del Cobre mountains, above the spring known as the Carricillo. The northwest corner was at the foot of a red hill which is seen, or, more properly, discovered, through an opening between the Penasco and the Sonoita mountain, and the southeast corner was on the Jarilito, at the corner monument of the lands of the presidio of Santa Cruz. The cross or side monuments were also located and piles of stone placed "to mark the place for the monuments."

Any further time consumed in arguing as to the meaning of this language would seem to be misspent. When a plain idea is conveyed in plain words, all has been done that can be done. The plain idea in this case is that the officials went out to comply with the request of the petitioner to segregate from the public domain the quantity applied for and afterwards sold, and that they did so by establishing the center and the corner and other monuments "*of these sitios,*" thus identifying a tract of land which they called "four sitios," and that when the government had thus officially marked out the applicant's land on the ground, he immediately received possession of it, and conducted thereon his business of raising cattle. The delivery of the formal

title was a matter of so little importance that it was deferred for certainly as long as nine years.

In the brief filed by the undersigned in case No. 40, October term, 1901, of this court, there is quoted what is given below from the opinion of Justice Sluss, of the Court of Private Land Claims, in the case of Arivaca Land and Cattle Company *v.* U. S., now before this court on appeal, No. 153, October term, 1901. The views of that learned judge are the result of the study of these grants in the many cases which have come before the Court of Private Land Claims, and are so clear and full that we deem it not amiss to quote them again:

"First, as to the question of location:

"I take it that a grant has been located within the meaning of the provision of the treaty in question when it affects to convey a particular tract of land capable of identification to a reasonable certainty.

"Now, giving this titulo the most narrow construction possible, it plainly purposed to convey a tract of two sitios at a certain place, with a recital that the tract so conveyed is identified by boundaries which are evidenced by certain specified objects. By any fair construction, it purports on its face to convey the whole of the tract within these boundaries.

"It does not say that it was the conveyance of a right to select two sitios thereafter to be identified and located within the prescribed outboundaries. It purports to be the final act of the government—the investiture of a complete title to a specified tract, with no future act to be performed.

"The contention however is that inasmuch as the grant purports to be of only two sitios and the original sale, having been made in 1812, must have been a sale of a limited quantity, and the outboundaries mentioned in the grant containing in fact an area in excess of two sitios, it must be construed as a sale of a certain limited quantity to be thereafter selected within a larger tract and was necessarily in the nature of a float and not located within the meaning of the treaty.

"This contention demands consideration.

"The grant recites that the original sale was made in

1812; therefore it must have been made under section 81 of the Ordinance of the Intendants as modified by the royal order of February 14, 1805 (Reynolds, 68). This ordinance required, and it was the practice, that no more than four sitios could be sold to one person of wealth and no more than two to a poor person; that the lands should be surveyed and appraised and not be sold for less than the appraisement, and that the appraisement should not be less than certain fixed sums, regulated according to the character of the land.

"Having in view these provisions and the recitals in the grant document, it is a necessary inference that the original sale was for a certain quantity of land, at the place specified, which had been surveyed by officers duly authorized to make the survey and appraisement in pursuance of the royal order.

"The question is therefore presented squarely, do not the proceedings of the survey, appraisement, sale and conveyance operate as a location of the tract sold within the meaning of the treaty?

"In my judgment the proceedings do have that effect.

"The essential feature or object of the proceeding was the protection of the revenues to insure a fair value for the lands sold. To secure this end was the object of the appraisement. This was practically the only protection there was. The law fixed a minimum limit.

"Now, what is an appraisement, except an appraisement of a certain thing? How can a man appraise two sitios of land unless he knows what two sitios? How could the appraisers know what two sitios they were to appraise? Why, this was the very object of the survey, to mark out on the ground the tract to be appraised and sold.

"To survey a tract of land means to mark it on the ground, not in the air, nor on paper. The surveyor was an officer of the government delegated to mark on the ground the tract sought to be purchased. When the survey was completed appraisers were summoned and sworn to appraise the tract of land surveyed. They were not authorized to determine whether the survey was correct or not, or whether it contained a greater area than the quantity sought to be purchased. In fact, they were not supposed to know what area was contained within the boundaries, nor what quantity was petitioned for. The surveyor was authorized to fix

the boundaries and determine the quantity of land within these boundaries. The appraisers could not go 'behind the return' of the surveyor as to the area of the tract surveyed. That was their guide and they appraised that tract identified by the boundaries adopted by the surveyor as to the two sitios of land which was the quantity determined by the surveyors to be contained within the boundaries.

"By that survey and appraisement the land was offered for sale at public auction at the capital of the district many miles from the land, and all the world was invited to come and buy; so I may say that the only fair construction of the transaction is that by the intent of the parties the outboundaries established by the surveyor were the boundaries of the two sitios appraised and sold and evidenced the location of the tract sold.

"Presumptively, the survey was correctly made. The presumption of law is that an officer does his duty. Wherever the determination of any matter is committed to a public officer, the determination so made is binding until set aside in a proper proceeding. An error in the determination cannot be shown in a collateral way.

"No survey is ever perfectly accurate. Never were two surveys made precisely alike. They are pre-eminently matters about which different men reach different conclusions. If the survey were in fact erroneous, covering an excess of land over the quantity directed to be surveyed, such error would not render the survey or subsequent proceedings based thereon void as to such excess, but render it voidable only as to such excess.

"The error or mistake in the survey did not appear upon the face of the proceeding.

"Now, it is a principle universally recognized that an official proceeding, which is not void upon its face but voidable only by reason of some mistake or error in the course of the proceeding, is valid and binding until set aside, or annulled in a direct proceeding for that purpose.

"The Supreme Court in Graham *v.* U. S., 4 Wall., 59, and U. S. *v.* Pico, 5 Wall., 536, has clearly indicated that the proceedings of these officers in surveying and establishing the boundaries of tracts of land for purposes of segregation from the public domain are in the nature of a judicial proceeding and have all the force and effect of judicial determination binding upon the former government.

"By this it is not meant that they are *res judicata*, finally and conclusively binding. A mistake is always open to correction, but can only be corrected in a proper proceeding.

"The idea I seek to emphasize is well expressed in Smelting Co. *v.* Kemp, 104 U. S., on page 640:

"'The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of the title the law has made numerous provisions designating the persons who may acquire it and the terms of acquisition. That the provisions may be properly carried out, a Land Department as part of the administration and executive part of the government has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment.'

"The views thus expressed are equally applicable to the proceedings of Spanish and Mexican officials in the disposition of the public domain. They are not merely an exposition of a peculiar rule of American law, but the expression of hard, common human sense applicable the world round.

"My conclusion, therefore, is that the proceedings of the survey operate as a determination that the boundaries of the two sitios are the landmarks specified in the report of the survey, and that this determination remains true and binding until set aside in a proceeding for that purpose.

"Such, it seems to me, was the view of the matter taken by both Spain and Mexico as shown by the practice of those governments. By a proceeding of denouncement and composition, lands within these surveyed outboundaries could be surveyed, and if an excess were found it could be appraised and sold; but I think I can safely say that there

was no other way in which the excess could be reached until denouncement was made and a determination was had of the question of an excess—that is to say, until the original survey was directly proceeded against and determined to be erroneous, the purchaser under the original proceedings held the possession and dominion of the entire tract by its surveyed outboundaries against all the world. By the original proceeding the entire tract was segregated from the public domain and remained segregated until by a proceeding, under a denouncement for that purpose, the excess, or demasias, was established or adjudged to exist and as such subject to sale. Until that occurred, there was no excess or demasias."

Mistakes in surveys were not confined to Mexico, nor is the position which we are here advocating a new one. On the contrary, it was announced by Chief Justice Marshall at an early day and has always been followed. The case of Taylor *v.* Brown, 5 Cranch, 234, was one where under a warrant for 2,000 acres, 3,025 acres had been surveyed. In delivering the opinion of the court Chief Justice Marshall said, as we have quoted in other briefs:

"The warrant, it is said, was an authority to survey only 2,000 acres, and, for the surplus, the survey was made without authority.

"It is a fact of universal notoriety in Virginia not only that the old military surveys but that the old patents of that country generally contain a greater quantity of land than the patents call for. The ancient law of Virginia notices this fact, and provides for the case. It prescribes the manner in which this surplus may be acquired by other persons, and it is worthy of notice that the patentee must himself reject the surplus before it can be acquired by another, and, after having so rejected it, he has the election to allot it in such part of the patent as he pleases.

"The survey is an appropriation of a certain quantity of land by metes and bounds, plainly marked by an officer appointed by the government for that purpose, and it would seem that the government receives his plat and certificate as full evidence of the correctness of the survey. This being the case, it is admitted by the government to be

an appropriation of the land it covers, and it is difficult to discern a rule by which the survey could be reduced on a caveat by the owner of an interfering survey unless the entry on which it was made was in such terms that the excess might be considered as surveyed contrary to location. For to every and to each part of the land surveyed, its owner has an equal right. * * *

"It is proper to premise that there is but one species of cases in which any court of justice is authorized by our land law to divest the owner of a survey of the surplus included within its boundaries, namely, when the survey was made posterior to an entry made by another person on the same land; and to do more would be unequal and unjust, inasmuch as a survey which is too small cannot be enlarged."

The case of Taylor *v.* Brown was cited and followed in the early California case of Vanderslice *v.* Hanks, 3 Cal., 28, where the court showed that even where the grant provided for a measurement and reservation of surplus "it was a grant of title to the whole, with a defeasance as to the surplus." The court said that "until the proper proceeding is adopted to restore the surplus to the public domain 'to every and to each part of the land granted, its owner has an equal right.'"

It is not believed that this reasoning of Chief Justice Marshall can be criticised in any respect, and we take it as a proposition that cannot be controverted that in every one of these Sonora grants the legal title and ownership of the whole of the tract which had been surveyed passed to the purchaser by virtue of the original title papers, though by mistake more land was included than was paid for.

But, even conceding that this grant conveyed title to the whole of the tract surveyed, a point may be urged substantially as follows: The Mexican officials should have accurately measured or estimated 200 cords from the center point in each direction. It must be assumed that the grant was made on the supposition that such measurements were accurate. A later survey shows, however, that they were

not, and the tract of land said to be 400 cords on a side is in reality of a greater area, and the question then arises, Should this error due to inaccurate measurements be corrected; and, if so, can it be done now, and in what manner?.

The court said in Ely's Admr. *v.* U. S., *supra*, referring to the inaccuracy of measurements: "If the outboundaries disclose a square or any rectangular figure, the excess of area suggests simply a carelessness of measurements, and can be corrected by a proportionate reduction in each direction."

If that rule were to be followed in this case, the grant would be confirmed for a tract of land measured 200 cords accurately in each direction from the center point, thus giving a tract of land 400 cords on each side and no more.

But in the Ely case the court added, "We do not mean to anticipate all the questions which may arise." We believe that in the present case the facts show that such rule cannot justly be applied, and there is also in this case the important question of law, which was not in the Ely case, of the right of the grantees to pay for the surplus. Both under the facts and the law, this case is distinguishable from the Ely and other cases.

In the Ely case the land granted consisted of a narrow canyon, through which ran a stream, with some agricultural land on each side, beyond which were broken and barren hills. The value of the grant lay in the water, and each sitio was appraised at sixty dollars because it had running water and some pieces of land fit for cultivation. If, as this court ruled, the measurements from the central point in the grant in that case were shortened so as to be accurate, the grant still remains substantially the same as before, and practically as valuable for raising stock, because the corrections of the measurements will not deprive the grantee of the running water; and this is true as to the other grants passed on by this court.

But if such rule were to be applied in the present case, it would leave out most of the running water and would

make a tract of land of an essentially different quality—one useless for stock-raising, and one which, instead of bringing the high price which the record discloses, could not have been sold at any price, because it would have been unsuitable for the purpose contemplated. As this grant was actually surveyed and sold, it included the large and valuable spring at the northeast corner and the running streams comprised within the three squares or quarters which were said to contain permanent running water. The eastern boundary began at the point of the Sierra del Cobre mountains, and the western boundary was the Plomosa mountain chain, and with the running water contained in this tract and possession of the whole of the tract, cattle could be raised to advantage.

But if the grant is restricted either to 100 cords in each direction from the center or even to 200 cords in each direction, the result will be that neither tract of land will contain the El Carricillo spring, nor will either contain three sitios or squares with permanent running water. The land sold, it must be especially noted, was designated and identified with reference to its quality as well as the quantity, and a grant of a tract of land of a different and inferior quality—one not possessing the important and, in fact, indispensable feature of containing permanent water—would not be such a grant as the parties contemplated. If either 100 cords or 200 cords had been measured accurately from the central point, outside the limits of either one of such tracts, there would have been a large amount of public land which would contain the permanent running water spoken of in this grant, and if the cattle of other persons had been put on this public land, it would have been impossible either to keep the cattle on this public land from trespassing on the grant, or the cattle of the purchasers from straying outside of the boundaries of the grant, as thus measured. Wire fences were not known in that day, nor could they have been used to advantage, because the habits of cattle on the

open range are at certain times to be in the valley and at other times in the mountains, and any interference with their movements would not be profitable.

It was essential that the purchasers should do what the testimony shows they did do, viz., to buy and occupy all the land between the four corners of the survey. The old settlers still remaining in the town of Santa Cruz south of this grant and who knew the original purchasers, and have always known where the monuments were placed, and how the land was occupied, so testified (rec., p. 208). The practical construction given to this sale by the parties at the time they took possession is of the highest value, and there is a most significant fact, to which we have adverted, that the well was dug in the southwest square or quarter beyond the limits of four leagues (40,000 cordeles). There is on this quarter the place known as La Noria, or "the well," at which place the purchasers of the grant had erected corrals for their cattle (rec., p. 209). On the tract of land included within the original monument they maintained from 2,000 to 20,000 head of cattle, whereas a tract of land 100 cords in each direction from the center would not support more than 400 head (rec., p. 161).

The price which was paid for this land is a fact to be considered. The record in the Sonoita grant shows that one and three-quarter sitios containing running water were appraised and sold at $60 for each sitio. That grant is immediately to the northwest of the San Rafael grant, and was made within a few days of it. The San Rafael del Valle grant, a short distance only from this one, contained four sitios, each with running water, and was appraised and sold at $60 for each sitio, or $240. The Babacomari grant, immediately to the north of this one, contained six sitios with running water, appraised at $60 each, and two arid sitios, appraised at $10 each, $380 in all, and was sold for this sum. The Canoa grant was appraised at $120 for four sitios and was sold for $250.

With this evidence of the prices paid at the time for similar land, can it be supposed that if this grant contained only four sitios (40,000 cordeles) it would have brought the unprecedented price of $1,200? Would eight sitios in the Babacomari, six watered, bring only $380, and four sitios in this grant, three watered, bring $1,200? The three sitios containing running water herein were appraised at $60 each and the remaining one at $30—$210 for the four, or an average of $52.50 each; but they sold for $1,200, an average of $300 each, and, on the four-league theory of this grant, five times as much as similar lands in the immediate neighborhood sold for at the time.

The high price can be explained only by understanding that this grant was known to be different from the grants of four sitios (40,000 cordeles), and that it brought the high price because each quarter was termed a sitio. In this view of the case, the price paid was an average of $75 per sitio (of 10,000 cordeles), which was reasonable, while the price of $300 per sitio (of 10,000 cordeles) is absolutely inexplicable, especially in view of the fact that the applicant stated at the outset that the land bordered on the country of the Apaches, who were constantly hostile, and for this reason was not especially desirable; certainly not more than other lands of the same character.

The remedy which the Mexican laws provided in cases of excess was not a curtailment of the land, but was an additional payment for the excess at the prices that governed when the land was sold. It was never the case, so far as any law or practice has been found, that any part of the land was taken from the purchaser, provided he wished to retain the excess by paying for it.

Articles 1 and 2 of the law of Sonora of May 12, 1835, are as follows:

"ART. 1. Those who have acquired property in lands of the State by lawful title are owners in good faith, even when they have lost that document, for they are entitled to re-

validate it upon proof of the incident that may have occurred.

"ART. 2. Those are likewise *bona fide* owners who under the descriptions given in their records of survey occupy some excess of land; and they are entitled to such excess, even after such excess is shown, without any other requirement than that of paying for the excess in accordance with the quality of the land and the price which prevailed when the land was measured and appraised; and only in case the owner does not want the excess, or when such excess is very great in the opinion of the government upon the report of the treasurer, shall such excess be awarded to any one denouncing or soliciting it; and such persons shall bear the expense of the resurvey, if the excess has not been ascertained. In lands measured by calculation (graduacion) none shall be regarded as excess that does not exceed half a sitio."

As we said in the brief in case No. 40, October term, 1901, the whole body of the Mexican law as to demasias is absolutely founded on the principle that the original grantee had the unqualified right to make a further payment and retain the surplus whenever the same might be ascertained. The law of July 22, 1863 (Hall's Mexican Law, pp. 173, 175), shows (art. 5) that the possessor had the right to retain the public land "if he had possession for ten years or a title translative of dominion." In order to determine the extent possessed, "it shall be (art. 6) within the limits mentioned in the title, even when they are not in conformity with the amount of land." "In the two preceding articles is comprehended the public land confounded in its totality with the fields which are not sold, or comprehended within them" (art. 7).

Article 8 provides that where the lands are denounced by a third person the original grantee "will concede the land to the denouncer, or pay him its value according to the tariff price in cash down."

We submit that this is of the greatest weight as showing that in every case the remedy for the excess was by a further

payment and not by taking from the original purchaser any portion of the land if he cared to retain it.

We further cited in that brief the many instances from the records at Hermosillo showing that the subject of demasias was continually acted on down to and after the treaty. This was done for the purpose of showing that the law of Sonora of May 12, 1835, continued in force. In Ainsa *v.* U. S., 161 U. S., 208–226, *supra*, there is the statement from the Mexican attorney general under date of December 5, 1842, six years after the constitution of 1836, specifically referring to "the provisions of the last clause of article 2 of decree No. 51 of the 12th of May, 1835, of the old State, and which is still in force."

As a matter of course, no question of excess could arise until there was a second survey or examination revealing the excess. There had been no second survey of this San Rafael grant at the time of the treaty. No one knew that it contained any excess. There was no obligation on the part of the purchasers to cause it to be resurveyed, nor was there any law providing that any government officer should make a resurvey. The grantees were justified in relying on the formal statement of the government officials that the tract contained four sitios, and on the official declaration of the Intendente that the proceedings of "measurement, appraisement and sale" of the four leagues "were in all respects regular and sufficient." They could wait till the excess was shown and then they were "entitled" to such excess "without any other requirement than that of paying for the excess in accordance with the quality of the land and the price which prevailed when the land was measured and appraised."

It will not do to argue that the power to acquire the demasias was only a privilege. The grantee was said to be "entitled" to them on payment therefor. This is the same word which is used in the first article of the law, providing that owners who have lost their title papers are "entitled"

to revalidate it, and in the report made in 1885 by the Minister of Public Works of Mexico to the Chamber of Deputies and the Mexican Congress, referring to overplus or demasias, he speaks of the "right" given to owners by the law of July 22, 1863, in its 5th and 6th articles. The full text of the paragraph in which it occurs is as follows:

"In order to carry on the investigation of said overplus (*demasias*), it is necessary to comply with all the provisions of said laws of July 22, 1863, and of the 15th of December, 1883, following the judicial procedure provided in the same. Consequently, no kind of abuses can be permitted, there being, therefore, no cause for the alarm among owners which has been spoken of on the floor of that Chamber. It is possible, nevertheless that some owners have become alarmed, but they are, without any doubt, those who are occupying lands and are ill-disposed to make use of the right given them by the law of July 22, 1863, in its 5th and 6th articles; or because they erroneously interpret the investigation by the companies which are acting in the representation of the government, for those who possess land in good faith, on the contrary, have seen, in the measures of the Executive, the lawful and honorable manner of legalizing their properties, avoiding conflicts for the future, and giving their lands a real value, which their properties could not have when their titles were doubtful. These assertions are duly proved by the petitions presented to the Department of Public Works by various owners, in which they themselves voluntarily denounce the overplus (*demasias*) which they have been possessing, and ask to enter into agreement with the government."

It would certainly be good ground for alarm if the owner of a tract of land, which he had bought and possessed in good faith under an official survey of the government, were told that it was to be curtailed so that what was left to him would be radically different from the tract which he had bought. The law of Mexico contemplated no such injustice. The "lawful and honorable manner" of rectifying the mistakes in the original surveys was by permitting the purchasers to pay for and retain the overplus.

"A right of any validity before the treaty was equally valid afterwards. The act recognizes a like legal and equitable right, and should be administered in a large and liberal spirit."

U. S. *v.* Moreno, 1 Wall., 400–405.

"The word *property* includes every species of title, inchoate or complete. It is supposed to embrace those rights which are executory as well as those which are executed. In this respect the relation of the inhabitants to their government was not changed. The new government takes the place of that which has passed away."

Hornsby *v.* U. S., 10 Wall., 224.

If our government claims to own the surplus because the Mexican government would have owned it if it had been discovered at the time of the treaty, this government takes it subject to the right of the grantee to retain it on payment therefor. The record shows that tender was made of an amount which would cover the whole of the surplus.

To put the contention on this point in a few words, we claim that if the surplus had been discovered before the treaty the grantees would have been entitled to it on payment therefor, and that this was a right or property which they have under our government as fully as under the Mexican government, and that it should be recognized in this case. This court has unrestricted jurisdiction by section 7 of the act of 1891, "to hear and determine all other questions properly arising between the claimants or other parties in the case and the United States," and this question of demasias is one actually and properly arising.

The foregoing has been an attempt to maintain three propositions, substantially as follows:

1. The legal title and ownership of the whole of the tract surveyed passed to the grantees by virtue of the original title papers, though by mistake more land was included than was paid for.

2. The right to remain in the ownership of any surplus that might afterwards be ascertained—which right was conditioned only on a further payment—was property protected by the treaty.

3. This court has power to recognize and enforce such rights by virtue of the further payments or tenders by the grant claimants.

LOCATION OF THE MONUMENTS IN THIS GRANT.

Some further objections raised by the government we shall now attempt to meet. As they seem of a minor character, they have been deferred to the last.

In this as in the other cases, the government witnesses have attempted to throw doubt over the location of the calls of the grant. The language of the title papers herein in describing the details of the survey, and of the natural objects called for, is singularly clear. Starting at the central point, there is no confusion on the face of the papers as to how the lines should be run or where they terminate. This grant is, perhaps, as clear in the description of the survey as any that ever has or ever will come before the court. It is fully complete, because not only are the lines run from the central point in the various directions, but the tract is squared—that is to say, the exterior lines are run also. The government, however, endeavors to throw confusion over the location of several of the monuments, chiefly of the ones on the northern line.

We respectfully suggest that it would be very strange if these Mexican officials did not describe the calls with such precision that it would be not only possible to find them, but impossible not to find them. The grantees and their various associates and employés in conducting the cattle-raising business were generally unlettered men. They had to trust not so much to books or title papers as to the conspicuous

points in the topography of the country. Their ideas of distances were of the vaguest, but their eyes were keen for what pertained to their immediate business. They knew and remembered the brands of cattle and they particularly well knew the topography of the country—where the water and passes in the mountains were, the names of the mountain ranges, and the designations of conspicuous natural objects. It would be very strange, therefore, if they should in this title paper or any other describe natural objects in a confused manner. When they speak of a spring and call it El Caracillo and say that the monument is beyond or to the east of it, at the point of the Sierra del Cobre, it may well be presumed that there was at that time a spring known by that name, and that there was beyond it a mountain range or sierra, and that this mountain range came to a point, and that a monument was put there just as described, and it would be highly improbable that anywhere else on or near the tract of land there should be another such spring and another such sierra coming to a point beyond the spring, so that it would be doubtful which one was meant.

The location of the north center monument is particularly described, and the northwest monument is located and described with reference to the north center monument. The location of these two monuments would make it certain that the northeast monument was approximately due east of the north center. The north center was said to be "on a mesa on the edge of a creek which runs towards the peñasco at the foot of an oak tree," and the northwest was at the foot of a red hill which is seen, or discovered, from the north center through an opening between the peñasco and the Sonoita mountains. The witnesses for the grant claimants fully identified the north center and the northwest, as well as the other monuments; but what seems more than strange in this case is that although the government witnesses were attempting to throw confusion over the location of the monuments of the grant, they did not go to the north center monument,

the location of which is the point mainly in controversy. Mr. Tipton testified on cross-examination as follows (rec. pp. 369, 370, 371):

"Q. You did not go up to the north center monument of the grant, did you? A. No, sir.

"Q. Why not? A. I was not told to go there. I do not know where such a place is, except as indicated by a map that he had.

"Q. Who was with you? A. Mr. Pope, assistant U. S. attorney for this court; Mr. Flipper, and a couple of men who were employed to drive."

It is to be regretted that the government witnesses did not go to this north center monument, because, as testified to by the witnesses who did go there, it exactly answers the calls of the expediente. If the government witnesses had gone to it and had corroborated the claimant's witnesses, it would have removed any supposed doubt as to the location of the northern monuments. If they had gone to the point taken by the claimants as the north center and had found that it did not answer the calls of the title paper, this certainly would have strengthened the government's case. Why did they not make a full investigation as to these monuments, and thus testify as to the whole truth? It would seem that this would have been a natural and straightforward course. In considering and deciding on these questions of fact the court would like testimony as to facts, but the government avoided testifying as to the facts concerning this north center and northwest monuments and offered instead a great amount of argument and reasoning based on theories.

The tract surveyed, as disclosed in the record in this case, was not an isolated tract. It was a square, the southern line of which was the northern line of the presidio of Santa Cruz to the south. The tract is therefore unmistakably located as to the southern line. The northwest corner monument of the presidio of Santa Cruz and its north center

and northeast monuments, the three establishing the northern boundary of the presidio, do not seem open to any doubt under the evidence. These monuments have long been established and were matters of public notoriety. The northwest monument of the presidio of Santa Cruz is on one of the two little hills beyond (or south of) the San Antonio pass, and this monument is expressly said to be a "corner monument *of these sitios*" sold in the San Rafael grant.

The east center monument was not seriously controverted, and the west center is absolutely unmistakable, because it is the only high limy peak in the range of mountains to the west. There is nothing like it, nor anything which could be taken for it.

The northwest monument is identified so peculiarly by the topography of the country that it is not possible to confuse or mistake it.

The witness Bonillas testified as to the red mountain or hill which can be discovered from the north center monument in an opening between the peñasco and the hills of Sonoita, and gave the following full description (rec., p. 104):

"Q. Now from this north center monument, can you observe any red hill in the direction of the peñasco, about which you have been testifying? A. It is a very singular fact that just about where the north center monument is, you can observe through an opening formed by a cañon of this very wash, of which the title speaks, running towards the west, a high chain of limestone hills, to the right or towards the north, looking from the north center monument to the west, and they end abruptly into this cañon; also, high hills coming down from the same cañon from the south, there is an opening through which you can see this red mountain in the distance, and that is all along the south like looking through a funnel, just like looking through a narrow, and that is all the description given in the title papers.

"Q. From the north center monument can you discover this red mountain through an opening, or at an opening, or

at the place mentioned in looking towards the peñasco? A. Yes, sir. It seems to be in an open place beyond these hills or ridge; there are other hills in the direction of the west.

"Q. Did you see a rock which answers the description of the peñasco like the photographs in evidence? A. Yes, sir. It seems to be very well known by that name.

"Q. And north, beyond and through that same arroyo running to the peñasco, you can see a red mountain? A. Yes, sir.

"Q. And only one? A. I think it is the only red mountain which you can see.

"Q. And this red mountain appears to be in an open place? A. Yes, sir.

"Q. Now describe that red mountain, and state whether or not there is anything in that direction which could be taken as a red mountain, or any other landmark? A. Standing at the north center this red mountain is at the end of the chain known as the Plomosa range of mountains—also known at the present time as the Patagonia mountains, I believe; it is the northern extremity. The red oxide of iron gives it a red appearance. This oxide of iron is very abundant on this mountain.

"Q. How does it compare in size with the other mountains around it? A. I think it is the highest mountain in that neighborhood.

"Q. From what direction can you see that red mountain? A. You can see it from all four cardinal points of the compass."

The witness Cameron testified as to the northwest corner as follows (rec., p. 163):

"Q. In looking towards the peñasco, can you see from the vicinity of the north center monument any other natural object that is called for in the grant, title papers? A. Yes, sir.

"Q. What? A. A red mountain.

"Q. Describe how you see that from there? A. Well, this arroyo or cañon cuts the Canelo hills in two as it were, also some of them look fast to each other; still there is an open space through which you can see this red hill.

"Q. What is the appearance of the red hill as to whether

it is connected with the other hills or not? A. It stands in the open.

"Q. Do you know where the Sonoita hills are? A. Yes, sir.

"Q. Where are they in looking from the north center monument? A. Towards the red hill just further north."

As to the north center monument and the northwest monument, the witness further testified (pp. 186, 187):

"Q. How did you first come to find it (the north center monument)? A. I hunted for it for months for a long time, many many days, looking for a point that would answer the description in the title papers and we could not find it; we finally sent for Mr. R. C. Hopkins, who used to be connected with the Surveyor General's office in this Territory.

"Q. Was he then connected with the Surveyor General's office? A. I think not; I think we sent to—he was living in San Francisco, and we wrote to him to come down; we drove him around over the grant with the title papers, and had some different people with me, and finally I took him over to the northeast corner, and in reading it he said, that it ought to be some point where this red hill could be seen through the ridge of mountains, seen through an open in the mountains which was to be discovered in a clear place; and when he told that, one of the men said, that I can immediately take you to a point. I know where there is a point which you can see through; I can take you to that point. We, of course, told him to do so, and he immediately took us around where the north center of the grant is located, and we looked through the hills and we discovered this red mountain, and discovered that arroyo that leaves this north center monument that runs in the direction of the peñasco, and it was so plain to our minds that that was the locality intended and called for, that we immediately knew it and have never had any reason to change our minds.

"Q. Did you find any monument or oak tree on the bank of the arroyo? A. We found the oak, very large oak trees.

"Q. The same stones and the same tree as shown in this photograph, now here in evidence? A. Yes, sir; the same tree and the same stones."

The witness testified (rec., p. 165):

"Q. Have you examined the country from the center monument as taken by Mr. Bonillas, to the northwest corner of the grant, sufficiently to be able to state whether there is any other red hill that will answer the calls of this monument, these title papers? A. I have.

"Q. Is there any other red hill? A. None other than the one at the northwest corner of the grant."

The effort of the government was to locate this northwest red hill to the east of the mountain range in which San Antonio pass and the mountain southwest of El Caloso are situated. According to the theory suggested by the government at the trial, the western boundary of this grant would run north from San Antonio pass to El Caloso, and then branch off northeasterly to some hill near Harshaw; but this contradicts the plain language of the title papers, which show that the northwest monument, the west center monument, and the southwest monument are in the same line, and the northwest monument can be established, in addition to the proof of the calls in their direct order, by reversing the call for the west side of the tract of land surveyed. The southwest corner monument of the sitios was arrived at by estimating from the northwest corner "400 cords toward the south upon the Sierra de la Plomosa to a point beyond the pass of San Antonio, where there are two small mountains which designate the corner on the side of the west of the common lands of the presidio of Santa Cruz." This northwest monument of the Santa Cruz land is unmistakably located on the very summit of one of these small mountains. As a matter of course, therefore, the northwest monument of the San Rafael grant should be found in a line with this monument of San Antonio pass, which line runs along the summit of the mountain range, over the top of the high mountain almost southwest of the hill called El Caloso, and terminates at the north at the foot of the red mountain. As the western boundary line beyond controversy runs along

the summit of the mountain range from San Antonio pass to the mountain southwest of El Caloso, it must be continued in a direct line north along the summit of the mountain range, terminating at the foot of a red mountain. The western line, as surveyed by Bonillas and Roskruge, completely answers this call; but there is not a word in the title warranting the government in putting the northwest corner monument on a foot-hill to the east of the Sierra de la Plomosa and entirely out of line with the southwest and west center monuments, which points are on the apex of the mountain range.

As to the northeast corner, the witness testified as plainly (rec., p. 165):

"Q. Is there any spring in the country anywhere from the center monument towards the northeast that will answer the call of the title papers as Carricillo spring, than the one taken as the El Carricillo? A. None."

This monument beyond this spring is located at or near "the point of the Sierra del Cobre," and the range of mountains to the east of this grant terminates at the point where this monument is. The court knows that a "sierra" is a mountain range and not a spur or foot-hill, and any attempt to locate a spring at any point or spur of the Huachuca or del Cobre mountains would not answer the call, which is for the point of the sierra.

The witness called by the government, Gavino Arriga, testified (p. 335) as follows:

"Q. All the people of Santa Cruz called that spring up there at Igo's El Carricito, do they not? A. Yes, sir. All the old people that I know; I know some of the old people who settled Santa Cruz."

The difference between the word "caracito" and the word "carricillo" is that the first means a small reed and the second means a larger reed of the same kind. That the spring thus taken by claimants at the northeast corner is

the one referred to in the survey seems to be established beyond room for serious controversy.

As showing the ignorance of the Mexican people as to points of the compass, etc., it is of interest to note what this witness says (rec., p. 336): "I do not know what northwest is; I know all the mountains standing on one side or the other of the mountains; I can give you the places; I do not know northeast or northwest."

But this witness did know the practical construction given by the original grantees to the extent of this grant, because he testifies (p. 335), that in 1887 or prior thereto the people of Santa Cruz including himself had made leases to certain mines at Harshaw, which place is outside the limits either of 100 cords from the center monument or of a tract 200 cords in each direction from the center monument.

To this we call the attention of the court in connection with the other testimony as to the fact that the grantees took possession of all the land within the corner monuments, claiming title to all of it, and exercising acts of ownership up to the boundaries. In endeavoring to arrive at what was the intent and understanding of the parties at the time, we submit that the evidence is consistent and overwhelming that all parties understood that it was the tract of land as surveyed which was sold.

RECORD OF THE GRANT.

There was produced at the trial of this case the original titulo, which was not questioned in any way by the government, and also a certified copy of the expediente, or matrix, which is now among the records at Hermosillo, Mexico. There was produced also the document heretofore quoted (p. 532), dated January 16, 1831, which refers to the sale of these lands on January 10, 1822, and requests the purchaser Romero to call and take the title to same, which was then in the possession of Mendoza, the Treasurer General. There

is also the letter, on page 533, to the Treasurer General, in which the purchasers of the grant refer to the fact that they have always endeavored to settle and occupy the lands in spite of the incursions of the enemies.

This seems to be the strongest proof of the genuineness and recognition of this sale. But, in addition, the title paper contains the following memorandum at the conclusion: "Entry of this title is made at folio 3, of Book No. 2, that exists in this Commisariat General." It was the custom to issue the final title paper and make a record thereof in the book of Toma de Razon and to note at the bottom of the paper that such entry had been made, referring to the book and page. The Sonoita grant passed on in Ely's Adm'r *v.* U. S., *supra*, final title to which was issued on the same day as this San Rafael grant, contains a similar notation that "note of this title is taken on page 3 of Book No. 2 in this general commisariat." Similar memoranda are appended to all the title papers which have come before the court.

Under the doctrine laid down by this court in Applegate *v.* Lexington & Carter County Mining Company, 117 U. S., 250, and Stebbins *v.* Duncan, 108 U. S., 32, 50, the memorandum annexed to the titulo in this case is the usual record evidence, competent and conclusive, that the grant had been recorded as therein stated. It will be presumed, unless the contrary is shown, that a public officer acted in accordance with the law and his instructions, and that all things were properly done.

The book of records number 2 in which the Sonoita and this San Rafael grant were recorded has been lost. Mr. Tipton, the government expert, testifies, pp. 91, 92, and 233, 234, of the record herein, that there are only two books of Toma de Razon in the records at Hermosillo. One is a small book which consisted of 12 leaves at the time witness first saw it, five of which contained writing and five of which were blank. On the first page of the first leaf it had the number "1" on it. The date of the last entry in this

Book No. 1 was May 13, 1825, and the first entry in the other book was some time in 1831.

Book No. 2, in which this grant is said to have been recorded, has been lost. Evidently a considerable number of titles were issued on the same day as this San Rafael grant, and these were put in Book No. 2, following Book No. 1, the last entry in which is, as just stated, May 13, 1825. It will thus be seen that this grant does not pretend to be recorded in either of the books now in existence.

As to the record of this grant, it is fuller even than the Sonoita grant above referred to, in which case the government did not see fit to raise the question of the recording of the grant, and possibly it will not do so herein, and the above is set out only because some of the justices of the lower court overlooked the fact that the testimony is that Book No. 2 has been lost, and also the fact that there is on all these grants a memorandum that they had been recorded.

Respectfully submitted that the decision of the lower court should be reversed and a decree entered confirming this grant for all of the land within the monuments.

ROCHESTER FORD,
Of Counsel for Claimants.

No. 109 & 132

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Jan. 27, 1902.

THE UNITED STATES, *Appellant*,
v.
A. A. GRIMES ET AL. } No. 109.

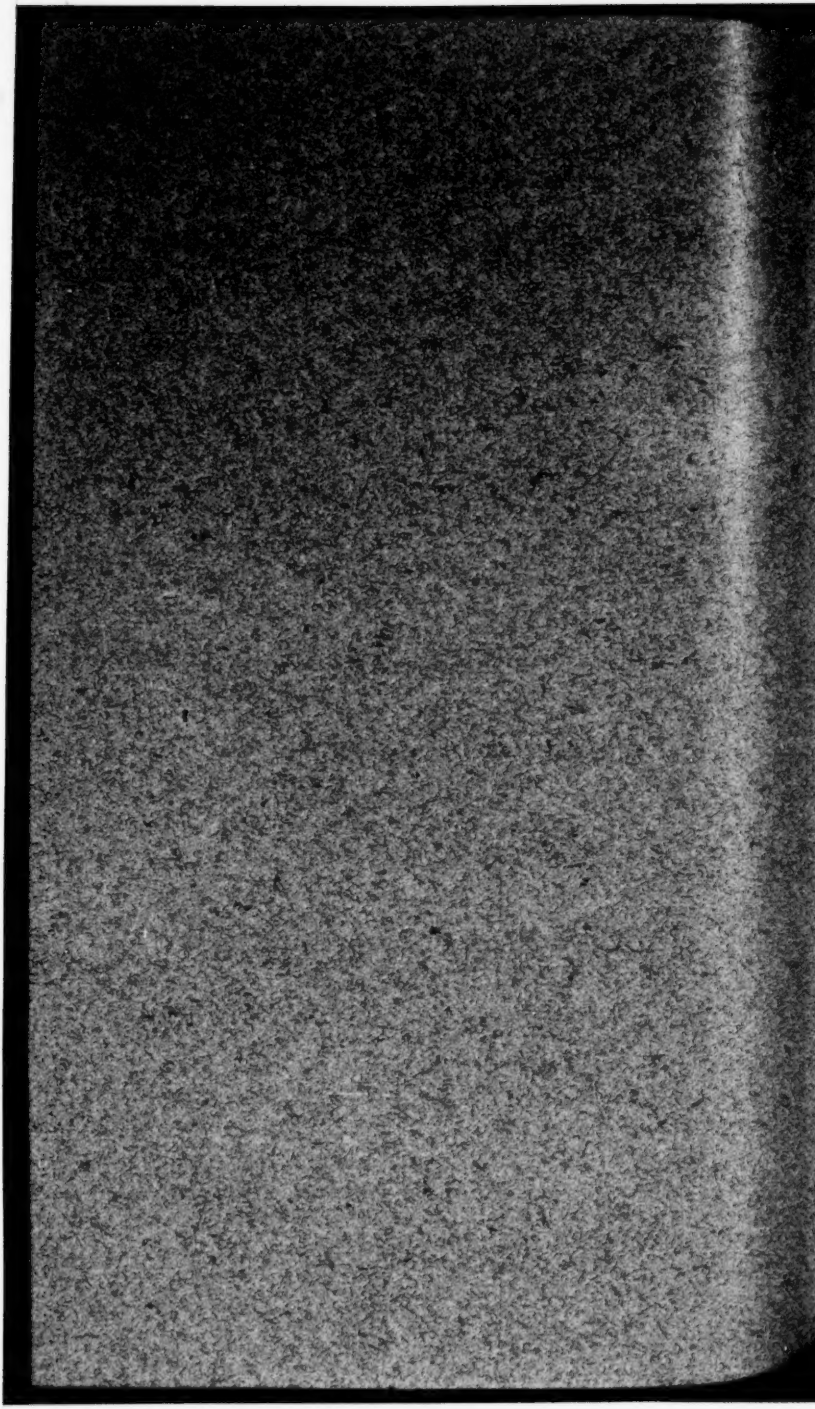
CHRISTIE ET AL., *Appellants*,
v.
THE UNITED STATES. } No. 132.

APPEALS FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF AND ARGUMENT.

JOHN W. GRIMES,
Of Counsel for Claimants

HAMILTON PRINT, 38 BEEKMAN STREET, N. Y. TELEPHONE 2078 CORTLANDT.



Supreme Court of the United States,

OCTOBER TERM, 1901.

THE UNITED STATES, *Appellant*, *v.* A. A. GREEN ET AL. } No. 109.

CHRISTIE ET AL., *Appellants*, *v.* THE UNITED STATES. } No. 129.

APPEALS FROM THE COURT OF PRIVATE LAND CLAIMS.

Statement of the Case.

This case involves the ownership, as against the United States, of a tract of land in Arizona, to which the claimants derive title under a Mexican grant made in the year 1825 to Ramon Romero and other citizens of the Presidio of Santa Cruz, in the State of Sonora.

The original application for the grant was made by Don Manuel Bustillo on July 19, 1821. In pursuance of his petition, the lands were surveyed by the Government surveyors, appraised, offered at auction the required number of times, and struck off and sold to Romero and other citizens of Santa Cruz for $1,200. The appraised price of the lands was $210.

When the survey was completed, and the description written out, it was signed by the Government Commis-

sioner, and Bustillo signified his acceptance of the survey by likewise signing the description. Thereupon, in pursuance of Mexican law and custom, he was inducted into the possession of the lands, and continued to hold the same until they were subsequently sold to Romero, to whom, as required by law, Bustillo transferred possession.

Bustillo, Romero and his coparceners, and other grantees, remained in undisputed possession of the whole tract until the cession of the territory of Arizona by Mexico to the United States. The claimants are *bona fide* purchasers of the title derived from Romero and the other citizens of Santa Cruz.

The survey and description copied from the expediente runs as follows:

Being at the central point, as fixed by the denouncer, which point is named San Rafael. * * * * * * The measurement was commenced, the line being run towards the north, in which direction were measured two hundred cords, which terminated on a mesa on the bank of an arroyo which runs towards the penasco, at the foot of an oak tree, upon which was made a cross, and at the trunk of which a large pile of stones was placed as a sign for a monument. Returning to the center, there were measured two hundred cords towards the south, which terminated at the mouth of the Canada of the Potrero, at the same point at which is found the monument of the common lands of this presidio on the side of the north. Returning to the center, there were measured and counted, towards the east, two hundred cords, which terminated beyond the said Canada of the Potrero on a contiguous mesa, where a large pile of stones was placed as a sign for a monument; and returning to the center, there was measured and counted, towards the west, one hundred and thirty-three cords, for the reason that the sixty-seven cords required to make the two hundred cords could not be measured on account of the roughness of the tract of land; these were, therefore, estimated, the estimated line terminating on a high mountain situated in the range of the Sierra de la Plomosa, almost

southwest of the hill called "El Caloso," the summit of which was taken to designate a monument, and returning from the center to the pla e at which the two hundred cords terminated on the north, from which monument we estimated, on account of the roughness of the tract of land, two hundred cords towards the east, which terminated beyond a spring known as "El Carricillo," at the point of the Sierra del Cobre (copper mountain), at which point a corner mounment is to be placed. In the same manner two hundred cords were estimated, on account of the roughness of the tract of land, towards the west to the foot of a Red Mountain, which was designated as a landmark, which mountain stands in an open place between the Penasco and the mountains of Sonoyta; from this point *four hundred cords* were estimated, towards the south, upon the Sierra de la Plomosa to a point beyond the pass of San Antonio, where there are two small mountains which designate the corner on the side of the west of the common lands of this presidio, and which point is to serve *as a corner monument of these sitios;* from this point there were measured and counted two hundred cords towards the east, the line terminating at the monument on the northern boundary of the said common lands (of the presidio), which is found at the mouth of the Canada of the Potrero, from which point, continuing the square, there were measured two hundred cords towards the east, which terminated on the Jaralito, at the corner monument of the said lands of the presidio, from which point *four hundred cords* were estimated towards the north, on account of the roughness of the tract of land, which ended beyond the spring "El Carrisillo," with which measurements was formed the square of the four sitios registered by Don Manuel Bustillo for raising cattle, *and as such he accepted them*, being informed that in due time he was to establish his boundaries with monuments of lime and rough stone, as required by law.

The Court of Private Land Claims decided that the claimants were entitled to have the grant confirmed to the extent of an area of four sitios, to be measured in a square from the centre established by the Mexican surveyor who made the original survey—that is to say,

starting from the central point and running 100 cords to each wind, or north, south, east and west, and comprising a tract 200 cords square—and denied the title of the claimants to all other lands for which they contended.

This argument is intended to be supplemental to and in amplification of the briefs filed by my associates, Mr. Ford and Mr. Heney; the points stated therein are respectfully referred to, and it is desired that they shall be considered as specifically adopted and urged by me.

I.

THE MEXICAN GOVERNMENT SOLD AND GRANTED A TRACT OF LAND AS SURVEYED.

THE COURT OF PRIVATE LAND CLAIMS HAS DECREED THAT THE CLAIMANT SHALL HAVE A TRACT *to be* SURVEYED.

The tract *to be* surveyed is not the tract which *was* surveyed and granted.

It is only a minor part of it.

The Government contends that the whole proceedings of the Mexican authorities in surveying; selling and granting these lands, shall be reformed, so that not a single line of the survey, not a corner of the tract, not a monument erected under the Mexican proceedings, shall have any judicial recognition or be accorded any effect or significance whatever in this final inquest of property.

Not only is the actual record of the proceedings by which title was acquired to be disregarded and set at naught, but the character of the lands appraised, the price at which they were sold, the fact of possession,

their adjacency to the presidio lands, are all to be likewise treated as of no import or effect either legal or equitable.

It is submitted that such a judgment, in view of the undisputed facts, and under principles of law that are, at least in all other cases, undoubted, will be neither more or less than public confiscation.

The courts should be more disposed to uphold than to overturn private rights claimed under international treaty. Yet we find the counsel of the Government, with unusual zeal and most minute research into the hazy atmosphere of old Mexican land law, endeavoring to raise against us doubt, suspicion and every adverse inference that would be justified in a proceeding against confessed frauds and cheats.

This case requires that the Court shall consider the subject of supposed excess as arising from two different sets of circumstances.

First, by reason of the supposed measurements of the survey including a tract 400 cords square, instead of one 200 cords square.

Second, because the tract as actually measured and surveyed contains more land than would be included in a tract 400 cords square.

The Government contends that the excess arising from both circumstances shall be held not to have passed to the grantee, while the claimants contend that they cannot be deprived of either species of excess, but must be decreed to be the owners of the whole specific tract included within the calls of the survey.

We perceive, therefore, that there are three questions in the case:

First.—Shall the claimant be confirmed in his ownership of the land which was actually measured, marked and taken possession of, although it includes more than the 16 square leagues which the surveyor intended to measure?

Second.—Shall the claimant have confirmed to him a tract containing an area of exactly 400 cords square? or

Third.—Shall he be limited to a tract 200 cords square as decreed by the Court below?

II.

THIS CASE IS DIFFERENT FROM ALL THE OTHER ARIZONA LAND GRANT CASES IN THIS: THE SURVEY AND PROCEEDINGS SHOW ABSOLUTELY, MATHEMATICALLY, ON THEIR FACE, THAT THE INTENTION WAS TO SELL A TRACT FOUR LEAGUES SQUARE, INSTEAD OF FOUR SQUARE LEAGUES.

If there was a mistake here, it was not by reason of inacuracy of measurement. The survey was *intended* to cover four leagues square. It was run out so. The distances declared were 400 cords on each side, not 200.

This must have been apparent to the promotor fiscal when he approved the survey and other proceedings and advised an auction.

In the case of the Nogales grant this same officer pointed out an error in the calculation of the area, an error much less obvious and striking than the one alleged in this case. *161 U. S., 229.*

All the Mexican officers, to whom that fact was as obvious as it is to this Court, approved the proceedings, and the sale and grant were so made.

Nevertheless, this Court is asked to put upon these proceedings a construction which the Mexican officials all declined to adopt; to decree that, when the promotor fiscal recommended the sale of a tract obviously four leagues square, he didn't know what he was doing, but meant to recommend the sale of a tract only one-fourth as large; to decide that when the Intendente signed the order for an auction, he did not intend to sell a tract four leagues square, but a tract two leagues square; and the same as to the President and members of the Commission of Auctions; as to the decree of the Intendente, directing the expediente to be forwarded to the Superior junta de Hacienda for its approval; as to that body when it approved.

(Note that the Indente Bustamente, and the Promotor Fiscal Perez were members of the provisonal junta.)

THIS MEASUREMENT WAS ACCORDING TO MEXICAN LAW.

The order of October 22, 1791, provides:

"Considering sufficient for the new settlements that are being formed under their protection, the boundary of four common leagues, measured from the center of the plaza of the Presidio, two to each wind, I have also determined, in order to avoid doubts and appeals in the future, that the Captains limit themselves hereafter in the concession of grants of lots and lands to those that shall be included in said four leagues, without their being increased in any manner, leaving free and operative the exclusive jurisdiction that belongs to the Intendants of the Royal Treasury for the sale, composition and apportionment of the other lands in their respective districts."—*Reynolds, p. 62.*

We must presume—this Court must presume—that the Promotor Fiscal had this law in mind: and, having it in mind, he must have considered that it governed the case in hand.

The Governor Intendente had approved all the proceedings, declaring that they were "in all respects regular and sufficient."

Let us consider this sale in a negative aspect, specifying what it was *not*.

It was not a grant of a right *to locate* 4 sitios of land within these outboundaries.

It was not a right *to use* any particular tract of 4 sitios within the outboundaries.

It did not confer possession as against third persons to any particular tract of 4 sitios within the surveyed perimeter.

It did not oblige the grantees to erect monuments about a particular portion within the boundaries, but did require them to be placed at the boundaries as surveyed.

If the survey had been afterwards found to comprise less than 4 sitios, there was no right on the part of the purchasers to have the deficiency made good or a proportionate share of the purchase money refunded.

It was not a sale at a certain price per league, or per sitio, or per square foot.

Let us assume, for the purpose of argument, what the claimants contend is a fact, namely, that the lines of the original survey are well known and definitely located, and are fixed by natural landmarks and artificial boundaries, as testified by Bonillas, so that no element of uncertainty in specific description shall obtrude into the field of our discussion.

What is there then to say, except to point to the rule, which is more an axiom of common sense than a rule of law, that monuments control courses and distances, and courses and distances control quantity?

When either the courts or individuals desire to know the extent of a grant of lands, if the description by monuments and natural or artificial boundaries is plain, definite and unmistakable, there is no room for the statement of quantity to play any part in the ascertainment.

What, therefore, is to be done with this grant?

Here it stands, unmistakable, plain, definite, in its stretch from corner to corner, from point to point, on the surface of the earth.

Either that description and location must be accepted and the grant confirmed to the extent covered by the survey, or the court must say that notwithstanding the rule of law referred to, *this* grant must be limited to the exact quantity named, and the quantity shall overrule the certain calls of the survey; the court must declare that, when the survey says the line extends to the Carricito Spring and the monument is seen there marking the corner, nevertheless the claimant cannot have his land to that extent because it is more than 4 sitios; and so on through every course specified in the survey.

What would such a decision amount to if not to a judicial reformation of the original proceeding on the mere ground of a mutual mistake in quantity?

This court cannot look into that question, any more than it can inquire whether as a matter of fact the Mexican officials were guilty of corruption or other bad faith in conducting the proceedings for a survey and sale.

Mexico never raised such a question; the United States, as the successor of Mexico, cannot do so.

Mistake or fraud would be grounds on which the grant might be said to be voidable, but it is not void for any such reason; it is a valid title until directly assailed by the Mexican Government on those grounds. And the

lapse of time would bar any suit brought for the direct purpose of setting aside the grant on either of those grounds.

In *Ely's Admr.* v. *United States, 171 U. S., 220*, it was said by the court that the inaction of the Government of Mexico in raising any question as to the validity of the sale, or in seeking to disturb the possession of the grantee, was very persuasive of the power of the intendant to make the grant.

The same remark applies here. The failure of the government of Mexico to question the validity of this grant, either on account of mistake in measurement, or of *ultra vires*, is very persuasive of the belief that the grant was authorized and was intended to cover a tract 4 leagues square, as the papers showed.

III.

TO DECLINE TO CONFIRM THIS GRANT TO THE EXTENT OF THE ORIGINAL SURVEY (PROVIDED THAT IS SATISFACTORILY ESTABLISHED) IS TO VIOLATE EVERY RULE OF ESTOPPEL,—EVERY PRINCIPLE OF HONESTY AND FAIR DEALING, WE MIGHT JUSTLY SAY, WHICH IN ORDINARY TRANSACTIONS IS APPLIED TO THE CONDUCT OF CONTRACTING PARTIES.

Here is a tract which the grantor marked out as the tract to be sold; here are the monuments and landmarks made by the grantor's surveyors, the monuments erected and maintained by the grantees and their assigns for 30 years and over under a legal requirement. Here

is the survey itself. "All this," says the Government, "we grant, as 4 sitios of land."

Now, it is conceivable that a prudent person, understanding the law to be, that in case the Government should find it had made an error and surveyed too much, the owner could not on that account be robbed of his lands and his improvements, but could correct the mistake by merely paying the value of the excess at the original Government price, might be willing to buy a tract like this from the grantee or his heirs; but it is inconceivable that any one, even the wayfaring man, though a fool, should be willing to buy if he understood that the Government or its grantee could repudiate every act of estoppel it had committed, refuse to accept the only equitable right it possessed—the right to have the excess paid for—and compel the owner to accept a small fraction of the lands actually surveyed, bought, sold and in possession, and that fraction practically at the option of the Government.

The remedy of Mexico for its own mistake was one which did no injury to the grantee, and made the Government whole. Is this Government to have any greater or better equity than Mexico? When did the United States acquire the privilege of denying to these *bona fide* owners a vested right, a property right, which their own country assured to them?

It is easily supposable that a grantee of such a tract might make valuable improvements upon it; under the rule invoked by the Government, he would lose them entirely, provided they were outside the strict lines of the relocation ordered by the Court. By the operation of the principle contended for by the Government no compensation for improvements can be made.

It is as certain as anything within human conception can be, that it was not the intention of the Mexican Government to grant, or of the grantees to purchase, the

mere tract of land decreed to the claimants by the Court of Private Land Claims in this case.

It is certain that the residents of Santa Cruz would not have bid at the sale if it had been represented by the Government that the tract was located as the decree locates it.

Neither would Richardson have bought it, nor Cameron.

These lands were of different values in different parts of the tract.

The square decreed to be laid off by the Court of Private Land Claims has not the qualities of the tract appraised; it is not the same land.

IV.

THIS IS NOT A CASE OF A GRANT PRECEDING A SURVEY AND LOCATION.

IT IS A CASE OF LOCATION AND SURVEY PRECEDING THE GRANT.

In cases of the first kind the specific lands ceded or conveyed are not known until the act of survey and segregation is done.

If survey and segregration are not made no title passes to any particular lands.

In cases of the second class no grant is made until survey and segregation; then the lands surveyed and segregated are conveyed.

In the first class of cases something remains to be done to complete the title after the grant is made.

In the second class of cases nothing remains to be done, everything necessary has been done, when the grant is made.

When the survey and location have been made in cases of a floating grant the title is complete.

When the grant is made *after survey* in cases like the San Rafael grant the title is complete.

Any error in measurement in either instance is an error in a completed, not an inchoate, title.

The only imperfection in the title in this case arises, not from any lack or omission of legal requirements, not from any failure to follow to the very minutest detail, the whole course of proceeding marked out by the law of Sonora in order to make a complete and perfect grant, not from a mistake in measurement, but from an error in assuming, as is claimed by the Government, that to survey the tract required it was necessary to run 400 cords in each side of the square—a mistake due to the grantor, and not to the grantee; a mistake made before the purchaser had anything to do with the proceedings, when another person who never acquired any title to the lands was the petitioner for the grant.

That mistake was not such as, under our law, or the law of Mexico, could affect or annul the title of the grantee to the whole tract indicated as the one intended to be sold and conveyed.

Had the price fixed been by the league or the acre an equity would have arisen in favor of the grantor to be paid the purchase price of the excess of area, upon demand, after establishing the fact of a mistake.

The title of the grantee would not have been invalidated, either as to the whole or any part of his grant. His title to all would be as valid as his title to any part. He could be divested of no part of it except by judicial proceedings, and then only on failure to perform the

equitable duty of payment of the sum which he ought to have paid and would have been compelled to pay, provided the true area was known when the grant was made.

Noble v. *Googins, 99 Mass., 231.*
Threadgill v. *Pintard, 12 How., 35.*
Tarbell v. *Bowman, 103 Mass., 343.*

But in this case the purchase price was a gross sum, and not a price by the sitio or acre.

Hence no equity arises in favor of the grantor, but the case stands as a sale of a specific tract for a lump sum. The suggestion that the grantor made a mistake and did not intend to convey more than four sitios, cannot be regarded as against the innocent purchaser who bid and paid for the tract as a tract.

It is as though an owner declared his purpose to sell four square miles of land at a certain place by public auction, and when asked what particular four square miles, should say,—"There are the description, survey, and monuments: that is the land I am to sell."

The fact that he so declared, that he sold and conveyed the tract for a lump sum, to the highest bidder, and suffered him to go into and remain in undisturbed possession of the whole tract for over 30 years, would be decisive against the grantor if at a later date he should complain that the tract comprised 16 square miles, even if it could be shown that he had made an unintentional mistake as to the area of the tract.

The rule of property ought to be, and is, no less stringent against a government proprietor than against a private grantor.

The learned counsel for the United States refers to the fact that the alleged error of the surveying 16 sitios instead of 4 sitios was a mistake, and he uges that this

Government shall take advantage of the alleged mutual mistake at this time, without regard to the equities of the other party or their successors in title, and decree the claimants to be entitled to but 4 sitios, "because it was a mistake."

In every case of sale by specific boundaries where there is a greater area than the parties suppose the same thing can be said; there is mistake, mutual mistake; mistake as to quantity; perhaps mistake in the consideration paid; but who ever held that in such case the sale was void as to the excess?

Has the grantee no rights? Shall the party responsible for the error alone have the right to demand relief?

They who seek equity must do equity.

"While courts of equity have the power to set aside, cancel, or correct patents or other evidence of title obtained from the United States by fraud or mistake, and to correct under proper circumstances such mistakes, this can only be done on specific averments of the mistake or the fraud, supported by clear and satisfactory proof.

"The general doctrine on this subject is that, when in a court of equity it is proposed to set aside, to annul, or correct a written instrument itself, the testimony on which this is done must be clear, unequivocal and convincing; and it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.

"Where the purpose is to annul a patent, a grant, or other formal evidence of title from the United States, the respect due to such an instrument, the presumption that all the preceding steps required by law had been observed, the importance and necessity of the stability of titles dependent on these official instruments, demand that the effort to set them aside should be successful only when the allegations on which this attempt is made are clearly stated and fully proved."

U. S. v. *The Maxwell Land-Grant Company, 121 U. S., 949.*

V.

THE DESIGNATION IN THE PETITION OF BUSTILLO OF THE QUANTITY OF LAND DESIRED, VIZ., 4 SITIOS, WAS IMPORTANT UNTIL THE LANDS WERE ACTUALLY SURVEYED AND THEIR BOUNDARIES MARKED; THEREAFTER THE SPECIFIC DESIGNATION WHICH WAS IMPORTANT WAS THE LANDS AS SURVEYED AND MARKED BY MONUMENTS, AND THE DESIGNATION OF QUANTITY BECAME UNIMPORTANT AS A MEANS OF IDENTIFICATION.

There was no idea on the part of any one—government officers or bidders—that anything more or less than the lands exactly comprised in the survey was to be sold and conveyed.

The appraisement related to the lands surveyed, as described in the surveyor's return, extending 400 cords along the north boundary of the town lands of Santa Cruz, running on the east from that line to the point in the Sierra del Cobre, near the Carracito Spring, a distance supposed to be 400 cords; thence west, a distance also supposed to be 400 cords, to the red hill; and thence south to the other monument of the Santa Cruz lands.

It was all the lands comprised within these boundaries which were appraised, not merely 4 sitios situated within them. It was the belief that all that area amounted to but 4 sitios; that may have been a mistake, but it was not the belief that anything less than the whole area was to be valued.

So also it was the lands surveyed and described by the surveyor which were *sold*.

It is absurd to say that these residents of Santa Cruz

had no eye to the natural features of the lands *as surveyed.*

There was the element of adjacency to the town lands; the water sources at the Carracito Spring, at the Jaralito, and elsewhere.

Would they have bid $1,200, more than five times the appraised value, if they had supposed a mere undefined tract of exactly 4 sitios was all that they were to get—and that tract not bounded, surveyed or marked, its characteristics unknown, the presence or absence of water unknown? It is absurd to think so.

And of what were they put in possession? Was it not of the tract as surveyed? Not of sitios the precise area of four, but of this whole surveyed area—*supposed* to be 4 sitios in extent—but little or no importance being attached to the feature of exact quantity, all the reliance being upon the natural features that could be seen, and the surveyor's description, and the monuments.

And where were the purchasers bidden to place monuments?

At the confines *of the surveyed tract*, not at the limits of some vague floating expanse within the surveyed area, an expanse whose location, boundaries and natural features were unknown.

"Here," said the officers of the Government, "are 4 sitios of land for sale." The bidder enquires, "Where are they; what do they comprise?" The Government officers point him to the survey, the description, the monuments. He takes the description and goes upon the land; he goes over it, following the calls of the survey; he sees the springs, the mountains, the gulches, the water courses; he notes the adjacency of the town lands for a distance of 400 cords. He forms an opinion of the desirability of that tract as it is described, and reports to his proposed copartners. They discuss the

value of the property; they decide they will buy it, even if they have to pay $1,200 for it.

Their representative Romero attends the sale, runs the property up, has it struck off to him. The money is paid, possession is taken, the expediente is issued later; the buyers continue in possession unquestioned and undisturbed by the Government for years until their Government parts with its sovereignty over the lands; when, during all those proceedings and all these years, ought the buyers to have known or suspected that they were getting or had got title, not to the tract they had in mind, but to a mere sixth part thereof, and that part not located or defined, or its quality or characteristics determined?

Surely no vendor would ever even suggest in seriousness such an unjust proposition as is put forth by counsel for the United States in this case.

In *Ainsa* v. *United States* it would seem to be conceded that, if it be proven there was a determination of metes and bounds by actual survey and delivery of possession accordingly, the grantee would take all the public lands included within the metes and bounds without regard to the expression of quantity.

On page 227 it is said:

"In any view, whether treated upon the principles "applicable to a voluntary grant or as a purchase and "sale, appellants' contention that Don Elias and his par- "ents took all the public lands north of Casita, as one "tract by metes and bounds could be sustained only on "proof of a determination of such metes and bounds by "actual survey and delivery of possession accordingly."

The Court in the Ainsa case found as a matter of fact that there was no delivery of possession according to the survey; that the official who was claimed to have delivered such possession was not a judicial officer and had no authority to perform a judicial act; and that, as

a matter of fact, neither that official nor the attending witnesses nor the grantees were, on the date on which possession was supposed to have been delivered, upon the land, nor anywhere near it, but were at the city of Arizpe.

Judicial possession was delivered of the whole of this San Rafael tract as surveyed, and this Court so held in construing this very title in *Cameron* v. *U. S.*, *148 U. S.*, *301*, where the language is, "While a grant of four square leagues in the place called San Rafael de la Zanja, standing alone, would appear to have been a grant of a certain quantity of land, when it appears by the same instrument that the limits of the grant were to be designated by monuments of lime and stone; that such designation was actually made, and that juridical possession of land was delivered in pursuance thereof; it is at least open to doubt whether it does not fall within the class of concessions by specific boundaries, as these grants are distinguished in *U. S.* v. *McLaughlin*, *127 U. S.*, *428*," and the Court further stated, referring to *Fremont* v. *U. S.*, *58 U. S.*, *542*, "as no survey in that case was made, it was held to be a grant of quantity only."

If the centre point be taken and only four sitios measured off in a square, as directed by the decree, the south line will not reach the north boundary of the Santa Cruz town lands.

Yet, that is what the purchasers undoubtedly desired and what they thought they were buying.

The petition of Bustillo expressly asked for a tract adjoining the presidio on the north.

Record, p. 526.

The survey runs 200 cords from the centre monument

to the mouth of the Canada del Portrero, where the monument of the town lands is to be found.

Record, p. 111.

The survey ran 400 cords east and west along the north side of the town lands.

The purchasers, when they bid $1,200 for the lands, undoubtedly thought they were acquiring a tract adjoining the town lands from the southwest to the southeast monument, whatever the distance.

Is it not clear that the boundaries, as fixed by the survey, were *for all purposes* supposed to be the accurate and true boundaries of the precise lands conveyed?

If before the cession of Arizona anyone had desired to purchase lands adjoining this tract, the owners of it would undoubtedly have been summoned and the boundaries marked by the survey would undoubtedly have been respected. Why summon the owners of adjoining lands if the true and final boundaries of the tract to be granted were not to be fixed by the survey?

If absolute accuracy in the survey is essential to vest a legal title, no Mexican grants are valid, for, it is safe to say, none are based on strictly accurate surveys.

The amount of land petitioned for is not controlling.

In the Ely case the petition was for 2 sitios, the survey for $1\frac{3}{4}$.

The law required the ability of the petitioner to stock the lands to be proven; and then allowed anybody to overbid him and secure the grant with no proof of ability.

VI.

DECREE NO. 51 OF SONORA OF MAY 12, 1835, OPERATED AS A LEGISLATIVE GRANT, CONFIRMATION AND RATIFICATION OF THE ORIGINAL GRANT IN THIS CASE. THE REQUIREMENT THAT THE GRANTEE SHOULD MAKE FURTHER PAYMENT IN CASE OF EXCESS THEREAFTER FOUND, IS ONLY A CONDITION SUBSEQUENT, OBLIGATORY ON THE GRANTEE WHEN, AND NOT BEFORE, AN EXCESS WAS ASCERTAINED, IN ACCORDANCE WITH THE DECREE, IN A PROPER JUDICIAL PROCEEDING.

As translated in *Ainsa* v. *United States*, the decree of May 12, 1835, is as follows:

"Art. 1. Those who have acquired property in lands "of the State by lawful title are owners in good faith, "even when they have lost that document, for they "are entitled to revalidate it upon proof of the incident "that may have occurred.

"Art. 2. Those are likewise *bona fide* owners who, "under the descriptions given in their records of survey, "occupy some excess of land; and they are entitled to "such excess, even after such excess is shown, without "any other requirement than that of paying for the ex-"cess in accordance with the quality of the land and "the price which prevailed when the land was meas-"ured and appraised; and only in case the owner does not "want the excess, or when such excess is very great in "the opinion of the government upon the report of the "treasurer, shall such excess be awarded to any one de-"nouncing or soliciting it; and such persons shall bear "the expense of the resurvey, if the excess has not been "ascertained. In lands measured by calculation (grad-"uacion) none shall be regarded an excess that does not "exceed half a sitio."

It has been shown by my associate, Mr. Rochester Ford, in his brief in case No. 40, October Term, 1901, by

many instances, that this law continued in force down to the date of the Gadsden Treaty. And in *Ainsa* v. *U. S.*, *161 U. S.*, *226*, is quoted a statement of the Attorney General of the Treasury, under date of December 5, 1842, which declares that the law of 1835 was still in force at that time. So that it could not have been repealed by the constitution of 1836, as claimed by counsel for the Government.

The language of Article 2, above quoted, is very plain. It refers to "occupants of some excess of land;" it declares such occupants to be *bona fide* owners of the excess, even after it has been shown, on condition of paying the additional price which prevailed when the land was measured and appraised.

This decree is a legislative confirmation of the legality of grants containing excess. It does not distinguish between the causes that have resulted in such excess. It refers to all who occupy such excess of land under description given in their records of survey.

This would cure any defect of title arising from alleged lack of power on the part of the granting officer to grant more than four sitios to any one person, and all other similar defects which related merely to excess.

The decree declares that such owners are entitled to excess at the then present moment, and that they would continue to be entitled to such excess, even after it had been demonstrated by a survey, if they complied with the conditions subsequent.

In the mean time no duty is laid upon the grantee. Until the Government ascertained the excess, the grantee was entitled to the whole property as contained within the description in his survey. After the Government had ascertained on its own proceeding that an excess existed, the grantee was still entitled to it upon the performance of a condition subsequent, namely, payment of the balance of purchase money.

The owner had the right to rest upon the presumed correctness of the original survey, which was made by the sworn officers of the Government. If he has reason to suppose that an excess exists in his grant, the right is given him, but no duty is laid upon him, to institute proceedings to ascertain the amount due from him to the Government, as a means of closing absolutely and finally the question of excess, and putting it beyond the power either of the Government or a third person to raise the question subsequently.

It is obvious that the Legislature of Sonora, at the time of the passage of the decree of May 12, 1835, was aware of the irregularities and mistakes almost universally existing in surveys, and that it intended by this decree to put an end to the disputes and contentions going on as to lands already surveyed and granted, by confirming the right and title of the grantees to the lands which they occupied, to the extent of the boundaries delineated in their surveys. It was a statute of peace intended to quiet and settle titles and prevent disturbance of possession of *bona fide* settlers who were engaged in improving their property and adding to the wealth and security of the State.

This law was intended as a release and quit-claim on the part of the Government of its right to reform the title by judicial procedure upon the ground of partial failure of consideration.

It recognized the *legality* of the grant to the full extent of the survey and description, and asserted no further or other equitable right in the Government than the right to claim payment of the additional price after ascertainment by corrected survey.

A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quit-claim from the Government (*Langdeau* v. *Hanes*, *21 Wall.*, *521*).

A grant of a right or interest in property by the Government, made by means of an act of the Legislature, is irrepealable (*Terrett* v. *Taylor*, *9 Cranch*, *44*.

Mexico had not power to repeal the law of May 12, 1835, so as to affect the vested rights of its grantees or their sucessors. Repeal would have been confiscation.

The legal title to the entire tract contained within the boundaries of the survey became vested in the grantee, subject to divestiture by judicial proceedings for reasons sufficient in law; the title of the grantee was just as good to one part of the land described in the title papers as to any other part thereof, until such a time as his title should have been declared forfeited by reason of his failure to comply with the conditions of the law; hence the right to pay for any excess upon a judicial ascertainment of its existence and value was not a mere privilege to purchase any particular part of the lands described, and cannot be construed as a privilege to purchase anything whatsoever, but was a mere equitable obligation to perform that which by subsequent proceedings had been discovered to be equitable and just as between the parties.

The right to pay the deficiency in price was a *vested right* to retain the ownership and possession of the entire tract, with no other obligation, requirement or condition than that of paying any balance of the purchase money which might be judicially determined to be due to the Government in some future proceeding, by reason of the fact that quantity was of the essence of the original contract.

The treaty protects such a vested right.

The term "property," as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory as well as those which are ex-

ecuted. In this respect the relation of the inhabitants to their Government is not changed, and the new Government takes the place of that which has passed away (*Soulard* v. *U. S.*, *4 Peters, 511; Delassus* v. *U. S.*, *9 Peters, 131.*)

It would be absurd to say that the undoubted right of the owner of this grant to remain in possession of all the land embraced in the boundaries set forth in the survey is not a valid and valuable property right protected by the treaty, and which this Government is bound to respect.

Counsel for the United States assert that the law of 1835 was a mere invitation to parties to acquire title, and created no vested right.

"Being no part of the original contract," they say, "it created no vested right as a matter of contract."

That law was a confirmation of what was previously a *bona fide* claim of title, a declaration which established as law, and against its interest, the status of the Government to lands so held by grantees or their assigns; it was a declaration which encouraged parties so in possession of grants which were known or supposed to contain excess to retain their possession, continue their improvements, defend themselves against Indian aggressions, and offer their lands for sale in good faith, confident that any defect in full title could of right, and not of grace, be repaired whenever duly ascertained, upon the equitable terms of payment of the balance of purchase money.

A declaratory statute like this relates back to the original transaction, and establishes finally and irrepealably, as against the governmental proprietor, the equitable title, and the lawful claim and possession of the grantee. To say that this law is a mere naked privilege, is to ignore the circumstances under which it was enacted,

the object to be accomplished, and the very words of the act itself.

Whether considered as a grant *in presenti*, or as a legislative declaration of the rights of the Government and the grantees under the original proceedings, it was effective to establish the *right* of the grantees to the whole area within their boundaries; for this no consideration was required, even if such a thing could with any propriety be supposed to be an element of a governmental grant, which it could not.

The status of the grantee, his *bona fides*, his vested equitable rights, being thus solemnly recognized, could not be changed or divested by any subsequent repeal of the mere method of procedure contained in the law.

That would be confiscation, and it is for practical confiscation that counsel of the Government is here contending.

Counsel speaks of demasias as public *land* of the nation.

That was not its character. The nation had a right, an equity, in the excess lands, but it was very different from the full, free and ordinary title to the unoccupied public domain. The right of the nation was not primarily to the lands, but to the money equitably due on account of their sale by mistake.

The proceedings from survey to sale all contemplated the conveyance of this whole tract. All the Government officials, surveyor, appraisers, promoter fiscal, intendente, we are told by counsel, thought they were dealing with and conveying only 4 sitios.

But they supposed the 4 sitios comprised this whole tract, and they did not intend to grant less than the quantity supposed to be within the limits of the survey.

They certainly did not mean to survey, appraise, sell or convey any particular 4 sitios of land within the bound-

aries, as distinguished from the whole area of the survey.

Is it said that what they intended to grant was a tract measured from the center point 100 cords to each wind? That is what the Court of Private Land Claims has adjudged the intention to have been. But obviously, indisputably, the tract surveyed, appraised, sold, judicially delivered over to the grantee, was not such tract, but one measured 200 cords to each wind.

That is the very survey which the Attorney-General approved. How can a conveyance by definite boundaries be more clearly indicated?

If we speak of the country stretching from the Atlantic Ocean to the Mississippi River, and from Canada to the Gulf, comprising four States, have we indicated the whole or only a part of the territory within those limits?

This Court has said:

"The Government promised to inviolably respect the property of Mexicans.

"That means the property as it then was, and does not imply any addition to it. The cession did not increase rights. That which was beyond challenge before, remained so afterwards. That which was subject to challenge before, did not become a vested right afterwards."

Ely's Admr. v. *U. S.*, *171 U. S.*

That is all true. The statement might be amplified, however. It might well be said that when the Government promised to inviolably respect the property of Mexicans, not only did it not imply any addition to it, but that it did imply no diminution from it. The cession did not decrease rights. That which was a vested right before, could not be challenged just because this Government had provided no method by which it could, in such a case as this, stand in the place of Mexico and

accept the balance of purchase money ascertained by subsequent proceedings to be due from the grantee.

And that leads me to the suggestion that if it be thought by the Court that no effect can be given to the offer of the claimants to pay the amount of purchase money that Mexico could have claimed, such a fact cannot operate to annul the claimants' title; otherwise the neglect of the Government to provide a means to collect money equitably due it would be turned to its own advantage, and all that would be required to work a forfeiture would be the refusal or neglect of the Government to appoint an agent to receive its revenue.

How does the equity of the claimant differ from that arising from an executed contract of sale where the vendor puts the vendee in possession, with a provision for the payment of the purchase money in future instalments?

Suppose Mexico had sold under an agreement of that kind, and the purchaser had entered, and paid part of he instalments, and he not being in default at all, Mexico had ceded to the United States the territory—would the lands then have become part of the public domain? Would the Court decline to recognize the validity of the vendee's title because he did not pay the remaining instalments, which Mexico could not, and this Government would not, accept?

The claimant's title was never subject to peremptory challenge by Mexico. The owners were never in default to Mexico. They were always in lawful possession of the whole area; under a form of conveyance which covered the whole; subject to no ouster or disturbance, except only that if Mexico should at any time, upon a showing of demasias, demand additional payment, and they should refuse such equitable demand, their title should *thereby* be forfeited. Forfeiture implies original

ownership. Divestiture of title by forfeiture of that kind could not occur until lawful demand of payment and refusal.

The fact that the one having the right to make the demand on which the forfeiture may be based has, by his own act, put it out of his power to do so, cannot be considered by a third party as equivalent to the forfeiture without any demand.

Through all the Mexican land laws runs the principle that titles shall not be invalidated by reason of default in payment of the purchase money or of excess, provided the purchaser be willing to do equity by paying the additional price (Hall's Mexican Law, Secs. 2106, 2107, 2108, 2109, 2110, 2125, 2126; 478, 479).

The basis of the law of demasias is a *right* in the grantee. That right is to correct the only error which can equitably be suggested in favor of the Government, which is responsible for the existence of the error, viz., to pay the additional price which in good conscience he should have paid if the true area had been originally known.

The grantee is without fault. All the proceedings are conducted by the Government—the measurement and survey, the appraisal, the issuance of the papers, the auction sale, the delivery of possession.

So the law did not treat the case as even justifying putting up the excess to auction to see what some other would pay, and allowing the grantee to take it at that price, as in the case of estimates and plans for municipal improvements under present Spanish law.

It allowed the innocent and *bona fide* occupant to keep it on paying the price which prevailed when the land was measured and appraised.

The *mistake* was mutual, but the *fault* was on the part of the Government.

And these mistakes were common, we ought to say, universal. The Government took no steps to seek a correction of the mistake which *its own agents* had occasioned; made no claim for the extra compensation, made no judicial move for an adjudication of forfeiture to divest the *bona fide* holder of the lands.

The law of 1835 declares that those are *bona fide* owners who, under the descriptions given in their records, occupy some excess of land: and they are entitled to such excess even after such excess is shown upon paying the appraised price.

The United States acquired this territory with such a right outstanding in these grantees; what part of that right is not under the protection of the treaty?

Can a *right* as against Mexico to retain the paper title and the possession of a grant to an excess amounting to thousands of acres of land upon the payment of a few cents an acre *when demanded* be repudiated by the United States by solemn judicial decision merely because the ceding nation is no longer in a position where it can demand its additional compensation?

Until it was *demanded* the grantee was not bound to pay the price of the excess.

Was the effect of the treaty to *destroy* vested rights, to deprive the grantee of his title and possession without any demand or refusal of payment?

Can the United States claim a higher or better right to these lands than Mexico had?

On what principle should they? The whole idea of the law of demasias is founded upon the fact that the *Government* had made mistakes, whereby innocent purchasers were in possession of specific tracts of land which, by no fault of theirs, they had taken as containing less area than actually was the case, and that com-

plete justice would be done by merely paying the original price.

The grantee under Mexican law had the same title and right to one part of a tract containing an overplus that he had to any other part. No one could specify any portion as valid and paid for, and another portion as demasias and not paid for.

The Government itself, under the laws of Mexico, could not enter upon or molest the grantee's title to, or possession of, any part of the surveyed tract, even under the law of demasias, *until after the excess had been shown*—that is, demonstrated by a new survey or other proceeding of a quasi-judicial character.

See 1 Orozco, 345.

Until subsequent survey or other quasi-judicial procedure showing an excess, there was, in the contemplation of law, no excess.

Only then did it devolve upon the grantee to act. He had the choice of two courses: (1) either to pay for the excess at the original appraised value, or (2) to permit the excess to be sold to a third party.

The latter was in the nature of an alternative, and was the penalty of forfeiture suffered for not doing manifest equity as between himself and the Government.

VII.

THE PROCEEDINGS OF OFFICERS OF THE GOVERNMENT IN SURVEYING AND ESTABLISHING THE BOUNDARIES OF TRACTS OF LAND FOR PURPOSES OF SEGREGATION FROM THE PUBLIC DOMAIN ARE IN THE NATURE OF A JUDICIAL PROCEEDING, AND HAVE ALL THE FORCE AND EFFECT OF JUDICIAL DETERMINATION BINDING UPON THE GOVERNMENT.

Graham v. *U. S.*, *4 Wall.*, *259.*
U. S. v. *Pico*, *5 Wall.*, *536.*
Smelting Co. v. *Kemp*, *104 U. S.*, *640.*
Taylor v. *Brown*, *5 Cranch*, *234-250.*

In *Taylor* v. *Brown* Chief Justice Marshall, speaking of the method by which lands were located and surveyed in Kentucky on military warrants issued under the proclamation of 1763, said:

"The survey is an appropriation of a certain quantity of land by metes and bounds, plainly marked by an officer appointed by the Government for that purpose, and it would seem that the Government receives his plat and certificate as full evidence of the correctness of the survey. This being the case, it is admitted by the Government to be an appropriation of the land it covers."

In *Vanderslice* v. *Hauks* (*3 Cal.*, *28*) the case of *Taylor* v. *Brown* was cited and followed in this respect, and it was decided that even where the grant provided for a measurement and reservation of surplus, it was a grant of title to the whole, with a defeasance as to the surplus. The Court saying:

"Until the proper proceeding is adopted to restore the surplus to the public domain 'to every and to each part of the land granted, its owner has an equal right.'"

A case of great importance is

White *v.* Burnley, 20 How., 235.

The second proposition decided by this Court in that case was

"The fact that the surveyor included more land than was called for does not avoid the grant. Whatever the State might do *to annul it*, third parties have no right to consider it void."

Upon this point the defendants prayed the Court to instruct the jury as follows:

1. That the colonization laws of Coahuila and Texas did not authorize the Commissioner of De Leon's colony to extend to Benito Morales a title for more than one league of land (a league being twenty-five millions of square varas); and the title being upon its face for fifty millions square varas, it was from the beginning null and void, and gives no right to recover.

2. That even if there was authority of law to include the excess of twenty-five millions square varas in the area, and exclude it from the computation because such excess was covered with salt bays, as expressed in the grant, yet if the jury believed from the evidence that the reasons were false, and that there was in fact a great excess of land (over and above twenty-five millions square varas) which was not covered with water or salt bays, the grant was void because of the excess, and the jury will find for the defendants.

But the Court refused to give these instructions, and gave to the jury the following instructions, at the instance of the plaintiff:

1. That at the date of the grant under which plaintiff claims, both by the general law and the colonization law, saline bays, extending from the gulf or the large bays, could not properly be included in a grant to a colonist, such bays, though embraced in the lines of the survey, would properly have been deducted from the

computation of the area of the grant, and the plaintiff's grant, on its face, is not invalid on that account.

2. The statement made in the survey contained in plaintiff's grant, that half of the survey was covered with saline bays, is *prima facie* to be taken as true at that time.

3. Any change which may have taken place since in the country included in the lines of the survey will not affect the validity of the grant.

4. Although the jury should believe that the grant when surveyed did not contain an entire league covered by saline bays, yet if they believe that the statement in the survey was caused by the mistake or neglect of the surveyor, it will not vitiate the grant; and in order to render the grant invalid on this ground, the jury must believe from the evidence that there was intentional fraud committed by Benito Morales, the grantee.

Upon the questions involved in these requisits and instructions the opinion of the Supreme Court was as follows:

"The quantity of land that the lines of survey include is equal to two leagues, whereas only one league is called for; and the reason the surveyor gives in his certificate of survey for the excess is, that he included in the survey a bay of the ocean, which was not subject to grant, a quantity equal to a league."

"This statement was proved to be untrue—almost entirely. The grant contains two leagues and more of fast land; and for this reason it was insisted at the trial that it was fraudulent and void. But the Court charged the jury to the contrary, with several qualifications. These we deem to have been useless; as our opinion is, that a regular grant (that is, a complete title, made by those exercising the proper political power to grant lands) is not open to this objection, by an opposing claimant setting up a younger title; and we understand that on this

principle the well-considered cases of *Hancock* v. *McKinney* (*7 Texas*) and of *Swift* v. *Herrera* (*9 Texas*) proceed. Such is the settled doctrine elsewhere. (*Overton* v. *Campbell, 5 Hayw. Ten. R.*)"

"How far the Government of Texas might interfere by 'due course of law' (that is, by a suit in its name and behalf) is a question for the Government to decide. *Owen* v. *Rains's Lessee* (*5 Haywood's Ten. R., 106*) is to the effect that it can only be done by suit."

"*To hold that this grant was void, because the surveyor returned an excess in his survey, without any evidence that the grantee participated in the matter, as is the case here, would be an alarming doctrine through a wide-spread portion of the United States. No instance is recollected where the State has interfered, by suit, to reform a land patent for excess of quantity. The consideration of more or less excess, to constitute a prima facie case of fraud, would give a latitude of discretion to the judicial department over the executive and granting power, inconsistent with the independence of the latter in this branch of administration.* Under the Spanish and Mexican Governments the judiciary had no authority to interfere at all in any case. The political department retained to itself all the power to reform or to annul titles.

But where the executive authority intervenes and calls on the courts of justice to aid 'in the due course of law,' no collision between the two departments can occur."

"*That a case of excess sufficiently gross could arise to justify a proceeding by suit on the part of the State of Texas to reform a Spanish grant we do not doubt.* (*United States* v. *Hughes, 11 How., 552.*) *But the question here is not of reform; it is of original nullity.*"

"What was the condition of Morales's title? He applied for a league of land as a colonist; his petition was granted, and a survey ordered. The surveyor made return of his survey to the Commissioner, who, in effect, exercised the granting power in De Leon's colony. The lines of the survey called for other adjoining tracts, and their corners previously made. On the faith of this survey the Com-

missioner proceeded to extend the title to Morales. It is probable that no actual survey was made on the ground; and hence, it happened that the surveyor's certificate stated that more than one-half of the boundary shown on the plat was covered by water, and not subject to grant. *Of this matter the surveyor and the Commissioner, as the judge of land distribution, had jurisdiction; it was their duty to act justly between the Government and the grantee. The Commissioner acted by extending the title of possession, and thus vested a full title in Morales. No one at that time had any right to complain, if the Government was content; it had so far acquiesced, and younger grantees are bound by that acquiescence.*"

JOHN W. GRIGGS,
Counsel for Claimants.

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Supreme Court of the United States

OCTOBER TERM, 1901.

No. 109.

UNITED STATES, APPELLANT.

vs.

A. A. GREEN, R. R. RICHARDSON, COLIN CAMERON, ET AL.

No. 129.

HARVEY L. CHRISTIE AND COLIN CAMERON, APPELLANTS,

vs.

UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF FOR HARVEY L. CHRISTIE.

Statement of the Case.

The proceedings for the purchase of this grant commenced July 19, 1821, upon a petition by Manuel Bustillo, a resident of the presidio of Santa Cruz, for leave to pur-

chase four sitios (17,354 acres) of land for grazing purposes. The proceedings for the survey and sale were carried on under the laws of Spain, which continued in force in Mexico for a considerable period thereafter. These laws, as well as the laws of Mexico and of the State of Sonora, down to the date of the Gadsden treaty, vested no power in the granting officer to make any sale of an UNSURVEYED OR UNLOCATED QUANTITY of land, to be SUBSEQUENTLY LOCATED, like the "floating grants" in California. All of the Sonora grants were sales of specific tracts of land for a valuable consideration and ACCORDING TO A PRIOR SURVEY. Any other kind of grant would have been void for want of power in the officer to make it.

In surveying this tract of land the officer in charge of the survey, through IGNORANCE AND NOT THROUGH FRAUD, surveyed SIXTEEN SITIOS. (See evidence referred to in my argument under title "MISTAKES IN SURVEYS.")

He was ordered to measure a tract of land to contain 4 sitios (17,354 acres), but his measurements and estimates, if absolutely correct, would embrace a tract of land containing 16 sitios (69,416 acres), or just four times the quantity which he had been ordered to survey. His measurements and estimates were grossly inaccurate, however, and, in consequence thereof, the tract of land actually surveyed by him and of which he put the petitioner for the sale in possession, as agent for the ultimate purchaser, in accordance with the laws and custom, contains an area of *about 35 sitios* (152,889 acres), or, in other words, the tract of land surveyed and sold contains an area A LITTLE MORE THAN TWICE AS LARGE AS THE QUANTITY SHOWN UPON THE FACE OF THE TITLE PAPERS BY THE PROCEEDINGS OF SURVEY, or nearly nine times as large as the quantity mentioned in the title papers and which the surveyor was ordered to survey.

THIS WAS NOT AN UNUSUAL MISTAKE, HOWEVER, IN THE SURVEY OF GRANTS OF LAND IN THAT SECTION OF MEXICO AT THAT PERIOD OF ITS HISTORY, AND SIMILAR MISTAKES WERE

NOT INFREQUENT IN ANCIENT SURVEYS IN THE AMERICAN COLONIES WHICH SUBSEQUENTLY BECAME THE UNITED STATES.

The tract of land so surveyed was afterwards appraised at $210, and was subsequently SOLD FOR A LUMP SUM OF $1,200 at public auction to the highest bidder.

Number of Purchasers of Grant.

The land was purchased by Ramon Romero and twenty-one other residents of the presidio of Santa Cruz, *and the law authorized two or more purchasers to become joint owners and grantees of a single tract of land containing an area equal to four sitios for each grantee.*

It appears on the face of the title papers that the number of grantees was not less than three, AND MUST NECESSARILY HAVE EXCEEDED FOUR persons (unless the number of residents of the presidio of Santa Cruz was less than four). *Hence the number of grantees exceeded one person for each four sitios of land contained within the tract of apparently sixteen sitios* shown by the title papers to have been measured, and *the number of grantees exceeded one person for every four sitios of land actually contained within the perimeter of the grant, according to the monuments called for in the title papers,* as that area amounts to a little over thirty-five sitios, so that *each grantee actually received an undivided interest of only about one and a half sitios of land* instead of four sitios. The laws of Mexico authorize a partition and allotment by judicial procedure as to tracts of land thus held in common.

Price Paid for Land to Mexican Government Exceeds Value of Entire Tract, and Four Sitios at Center of Grant Practically Worthless Then and Now.

Hence right of Mexican government to reform title and forfeit any excess must be a plain, unequivocal, and strictly legal right, as it cannot be based upon any principle of equity or of sound morals or of natural justice.

The price paid to the Mexican government for the land AMOUNTS TO AN AVERAGE OF $75 PER SITIO FOR THE SIXTEEN SITIOS, which are shown by the title papers to be contained in the grant according to the survey.

The price paid EXCEEDS THE MINIMUM VALUE *which the government was willing to accept for the land*, PROVIDED EACH AND EVERY ONE OF THE SIXTEEN SITIOS WAS OF THE BEST QUALITY, to wit, contained permanent running water.

The price paid for the land EXCEEDED THE PREVAILING MARKET PRICE FOR SIXTEEN SITIOS OF LAND in that section of that country at that time, EVEN IF EACH OF THE SIXTEEN SITIOS CONTAINED PERMANENT RUNNING WATER.

The price paid for the land EXCEEDED THE PREVAILING MARKET PRICE FOR THE ENTIRE QUANTITY AND QUALITY OF LAND ACTUALLY CONTAINED WITHIN THE PERIMETER OF THE GRANT.

The price paid for the land EXCEEDED THE MINIMUM PRICE WHICH THE GOVERNMENT WAS WILLING TO ACCEPT FOR THE ENTIRE QUANTITY AND QUALITY OF LAND WHICH WAS ACTUALLY CONTAINED WITHIN THE PERIMETER OF THE GRANT.

The grant contains practically no land whatever which is capable of cultivation by irrigation or otherwise. On the contrary, it is a plateau about 4,500 feet above the sea level, which is badly broken up throughout a great portion of it by rough hills and gullies, and it is "a waste country wherein the valley was devoid of trees, with low places and table lands, completely dry, there being no running water

upon them for irrigation," to use the language of the Mexican official who was intrusted with the original survey.

Four Sitios at Center of Grant Utterly Valueless.

The evidence shows that a tract of land containing only four sitios, located in a square at the center of the grant, would not support to exceed four hundred head of cattle, and hence it would be practically valueless, and IT IS INCONCEIVABLE THAT ROMERO AND THE OTHER RESIDENTS OF SANTA CRUZ INTENDED TO PAY THE ENORMOUS PRICE (in those days) OF $1,200 FOR SUCH A TRACT OF LAND TO BE USED BY THEM AS A CATTLE RANCH.

It would have been better to oppose the survey as incorrect, and to oppose the sale upon the ground that Bustillo could not purchase more than four sitios of land, and to thereafter themselves denounce and purchase the land which would lie between the southern boundary of such a grant and the northern boundary of the presidio of Santa Cruz, because said tract of land lying between the two grants could have been purchased for about $40, and it would have enabled the purchasers to secure the benefit of all the running water and grazing land which Bustillo would have acquired by his purchase. They actually placed from two to twenty thousand head of cattle on the grant immediately.

Minerals Added No Value to Grant.

The title to minerals did not pass to the grantee under a Spanish or Mexican grant, and hence in surveying or selling land for cattle ranches the Government paid no attention to the existence or non-existence of minerals within its boundaries; and it was then essential, and is now, in that country to have some portions of the ranch mountainous in order to furnish protection and feed to the cattle in winter.

And a square at the center containing 16 sitios would in-

clude simply rough gullies, in addition to the valley, and not any of the mountains.

The act creating the Court of Private Land Claims expressly provides that in confirming title to such grants and in issuing patents to the same the United States shall exclude the minerals.

Under the laws of Spain and Mexico any person may prospect for minerals upon private property and denounce and obtain title to the same.

Possession.

The original grantees placed about 20,000 head of cattle on the grant, and built corrals and houses thereon and occupied the whole thereof to the boundaries claimed by the present petitioners for confirmation. And they maintained this possession continuously from 1821 until 1854, with the exception of brief intervals of time, during which the Apache Indians were unusually active (Rec., pp. 204, 205, 208, 384, 427, 430, 431, 91, 330, 334, 335, 443, and 446).

THIS POSSESSION WAS MAINTAINED AT GREAT COST OF PROPERTY AND SACRIFICE OF LIFE.

Occupancy was THE PARAMOUNT CONSIDERATION exacted by the Mexican government, and the title papers contain the condition that THE LAND WILL BE FORFEITED AND ANY OTHER PERSON MAY DENOUNCE THE SAME if the grantee or his successor in interest fails to occupy the same for a continuous period of ONE SHORT YEAR.

Present Owners Bona Fide Purchasers.

The original grantees continued to maintain possession of the grant after the treaty, and paid taxes upon the same to the Territory of Arizona, until some of them sold to Alfred A. Green, in 1879, and they leased that portion of the grant upon which the mining camp of Harshaw is located to the

original mining locators for a period of either twenty or forty years, in 1878 (Rec., pp. 330, 334, and 335).

The record in this case shows that R. R. Richardson contracted with Alfred A. Green for the purchase of his interest in the year 1880, and that Colin Cameron purchased the interest of Richardson in 1883, and paid him something over $46,000 for his interest, and that Cameron afterwards paid additional sums, amounting in the aggregate to over $80,000. for the interest of other Mexican owners.

The record further shows that Colin Cameron so purchased the grant as the agent and trustee of William C. Whitney and William Brown, of New York, N. Y.; ex-Attorney General Wayne MacVeagh, J. Don Cameron, John H. Small, George S. Billmeyer, and W. W. Ker, of Pennsylvania, and Frank Ely, of St. Louis, Missouri, and others, and that these owners have expended about $500,000 in stocking, improving, and attempting to maintain possession of the grant.

It further shows that since the year 1883 they have paid to the Territory of Arizona between $25,000 and $30,000 in taxes upon the grant alone; and it will be shown in my argument that these taxes were not paid for possession merely, but, on the contrary, that *the assessment was upon the land itself* and *upon the entire tract of land contained within the perimeter of the grant as claimed*, REGARDLESS OF THE FACT THAT ONLY A SMALL PORTION THEREOF WAS IN THE EXCLUSIVE POSSESSION OF THESE CLAIMANTS, AND THAT PRACTICALLY THE WHOLE OF THE GRAZING LANDS WITHIN THE GRANT ARE OCCUPIED IN COMMON BY THE CATTLE OF THESE OWNERS AND OF SQUATTERS WHO HAVE SEIZED AND FENCED SMALL TRACTS OF THE BEST PORTIONS OF THE VALLEY LANDS, SO AS TO INCLOSE AND HOLD THE BEST PORTIONS OF THE PERMANENT RUNNING WATER WHICH IS UPON THE GRANT.

The validity of the grant title was passed upon by eminent attorneys for the present owners before they purchased, and they were advised that the grant conveyed an unimpeachable title to all the land within its perimeter, according to the boundaries described in the title papers (Rec., p. 185).

United States Estopped.

The United States has exercised dominion over the section of country in which this grant is located for a period of forty-eight years, and the grantees and their successors in interest have paid to it taxes upon the entire quantity of land contained within the perimeter of the grant, and *whether these taxes were for mere possession or upon the land itself* THE OWNERS WERE COMPELLED TO PAY THE WHOLE TAX IN ORDER TO PROTECT ANY TITLE WHICH THEY MIGHT HAVE TO ANY PART OF SAID LAND; and yet during this entire period of time the United States failed to provide any tribunal IN WHICH THE OWNER OF THE GRANT COULD PROTECT HIS RIGHT OF POSSESSION TO ANY PART OF THE LAND BY VIRTUE OF HIS MEXICAN TITLE.

For nearly half a century the United States has failed to provide any tribunal in which the owner of the grant could protect or maintain his right of possession to any part of the land by virtue of his Mexican title. It has left the owner of the grant upon an exact equality with any squatter, even though he seized a portion of the four sitios of land at the center of the grant, and even though he did this since the Court of Private Land Claims rendered its decree confirming that particular four sitios to these claimants.

The legal title to the entire tract of land is in the claimants, and it is the Government of the United States which is seeking to reform the title in these proceedings, upon the ground that it is entitled to this equitable relief as a subsequent grantee from Mexico of any interest remaining in

that government in this property at the date of the Gadsden treaty.

We have paid more in taxes to this Government upon the land than it paid to Mexico for the land, *and we have received absolutely nothing in return; and we submit that, even if the government of Mexico did have an equitable right to reform the title to the grant, the United States* OUGHT TO BE ESTOPPED BY ITS CONDUCT AND LACHES FROM ENFORCING ANY SUCH RIGHT as the assignee of Mexico.

All Arizona Grant Titles Now Settled.

The total number of grants claimed to exist wholly or partly in Arizona does not exceed a dozen, and the titles to all of them have been finally determined, with the exception of the three or four now pending before this court, and no person can be adversely affected by any modification of the rule upon which the Ely case was decided, provided no distinction can be drawn between that case and the one at bar, upon the ground that the price paid for the land in this case exceeded the prevailing market price and legal minimum value of the entire quantity of land contained within the perimeter of this grant.

Record of Grant.

The original titulo, or patent, to this grant was admitted in evidence without any objection on the part of the Government, and it contains a statement at the end thereof that a "Toma de Razon" (memorandum or note of title) was made on "page 3 of book No. 2."

Only two books of Toma de Razon are found in the archives at the present day, and neither one of them is entitled "No. 2." On the contrary, the first book bears the inscription "No. 1" on the first page, and the last entries contained in it are dated May 13, 1825. It is an insignificant affair,

about six inches or less in length, and less than that in width, and contains only twelve leaves, and only five of these contain writing. The other book is much larger and bears an inscription on the first page stating that it contains notes of titles commencing in the year 1831, and it actually does not contain a single entry of any title issued prior to 1831.

A large number of expedientes of grants are in the archives, which bear a memorandum at the end thereof showing that title was issued between May 13, 1825, and the year 1831. Among them are nine grants beside this one, the titles to which appear to have been issued on May 15, 1825, and eight of these grants are located within the present limits of the State of Sonora, and the validity of the title to no one of them has ever been questioned there, but, on the contrary, their validity has been expressly recognized.

In one of them, the Alamo de Sevilla grant, *the surveyor made the same mistake which was made in this grant*, to wit, he measured sixteen sitios instead of four, and the title to the same has not only been recently recognized as valid by the Mexican government, but the successor in interest of *the original grantee has been permitted* under the law of 1894 *to retain the whole of the grant* by paying an additional price for the excess of quantity contained therein, *although the excess was almost as great as in this case* (Rec., pp. 96, 97).

Status of Colin Cameron and Harvey L. Christie as Parties.

This is an *action in rem* to fix the status of a paper—*i. e.*, the patent or titulo to the grant—and is, in all essential elements, identical with a proceeding in probate to establish the validity or invalidity of a will, and all parties who might have their interest in the property affected, either favorably or adversely, are proper parties to the suit, because they will be bound by the decree.

The act creating the Court of Private Land Claims was approved March 3, 1891, and provides that all persons having imperfect or incomplete titles must file a petition for confirmation of the same within three years from said date. It does not limit the time as to a "perfect" grant, and the lower court held that this is a "perfect" grant.

The original petition of Alfred A. Green, through whom Colin Cameron partially derives title, and through whom Harvey L. Christie partially derives title, was filed in the Court of Private Land Claims on February 27, 1893, more than one year prior to the expiration of the statute of limitations. That court thus acquired jurisdiction over the subject-matter by the law of 1891 and over the persons of Colin Cameron and of Alfred A. Green, so as to be able to render a valid judgment against them and in favor of the United States.

Alfred A. Green was not represented simply because he died before the trial in the court below, and his heirs still vigorously assert an interest in the grant. These facts were unknown to Cameron and Christie prior to the perfection of their appeals.

Moreover, the action is an action *in rem*, and fixes the status of the title paper under which all parties claiming through the original grantee must establish title. Like the probate of a will, the judgment is conclusive against the entire world upon the question of the validity or invalidity of that title paper. Hence it is immaterial by what party claiming an interest under the original title paper the suit was instituted. All parties having an interest may come in or be brought in at any time, pending the proceedings to have their rights determined, in so far as such rights depend upon or might be affected by the status of that original title paper.

Section 7 of the act of 1891 provides:

"That all proceedings subsequent to the filing of said petition shall be conducted, as near as may be, according to

the practice of the courts of equity of the United States," et cetera.

Hence all parties in interest—that is, all parties who may be affected by the result of the proceeding—may be brought in and made parties defendant by an order of court.

The learned counsel for the United States proceeded in accordance with this well-settled principle of equity practice by moving the Court of Private Land Claims, on February 4, 1899, to make a large number of other persons defendants, and to require the petitioner to have them served with a copy of the summons and petition. The order and service were made (Rec., p. 17).

Harvey L. Christie was made a party defendant on motion of the attorney for the United States by an order of court made and entered March 20, 1895 (Rec., pp. 12, 13).

Christie was required to appear, demur, or answer within thirty days. He did so, and was afterwards allowed to withdraw that answer and to substitute another, which he did on February 4, 1899.

Colin Cameron was made a party defendant by Green's petition, and on March 29, 1894, the Court of Private Land Claims made an order granting Cameron sixty days from that date to answer Green's petition, and continued the cause for the term by consent of all parties. The United States made no objection to this order (Rec., p. 4).

Cameron filed an answer within the sixty days, and was afterwards allowed to substitute another answer, which was filed March 25, 1895.

And on February 4, 1899, Colin Cameron was allowed to file another answer without objection by the Government (Rec., pp. 8–12).

And on February 4, 1899, Harvey L. Christie was allowed to file another answer without objection by the United States (Rec., pp. 12–17).

And on February 4, 1899, by permission of the court,

Colin Cameron was allowed to withdraw his demurrer on file and to file an amended answer, which he did on that day, without objection by the United States (Rec., p. 17).

And thereupon the United States proceeded to a trial of the case upon its merits, without any objection to the appearance of Colin Cameron or Harvey L. Christie (Rec., pp. 17, 18).

Hence, the Government is precluded from raising any question as to the right of Cameron or Christie to appear in said action, except upon jurisdictional grounds. The limitation of time within which the action must be commenced can be waived by the United States, and is waived, unless pleaded, like any other statute of limitations. It is in no sense a limitation upon the power or jurisdiction of the court over the subject-matter.

The jurisdiction of the court is defined by sections 7 and 13 of the act of 1891. Section 7 provides, among other things.

"That the court shall have full power and authority by final decree to settle and determine the question of the validity of the title and the boundaries, according to the law of nations and stipulations of the treaties concluded between the United States and the Republic of Mexico," et cetera.

And a petition having been filed by any claimant, the subject-matter of which is the validity or invalidity of a Mexican title to land within the area of the Gadsden purchase, and some party having an actual interest in said title, so that he would be affected by a judgment pro or con, having been made a party to the suit, and having appeared therein, the jurisdiction of the court over the subject-matter is complete, and the only limitation upon its power to render judgment is found in section 13 of the act of 1891, in part as follows:

"No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the States of the Republic of Mexico," et cetera.

Points and Authorities.

I.

The rule of *stare decisis* has no application, because all the land within the perimeter of the grant, as claimed, has at all times been reserved from entry by the Government, and hence no person can be injured if a decision confirming this grant to the boundaries is considered a change from the rule laid down in the Ely case, and because all the Arizona grants have now been finally settled, with the exception of the three or four now pending on appeal in this court.

II.

This case differs radically from the Ely, Maish, Perrin, and all other Arizona grant cases heretofore decided by this court, because in each of those cases the Government received from the grantee only the prevailing market price, which in every instance was only the legal minimum rate fixed by law, or an insignificant amount more than that, for the land;

Whereas *in this case the Government received more than four times the prevailing market price and legal rate for the sixteen sitios of land* which would have been included in the survey as made if the measurements had been correct, and the entire quantity of land contained within the perimeter of the grant is only *twice* as large as the area indicated by the survey; and

Whereas *in this case the Government received more than one and six-tenths times the prevailing market price and legal rate for the entire quantity and quality of the land which is contained within the boundaries of the grant as described in the title papers.*

Occupation was an additional important, if not paramount, consideration, and proof of ability to occupy it was a prerequisite

to the grant, and in this case it was occupied at enormous cost of property and great loss of life.

Inadequacy of consideration or fraud in the grantee constitute the potent and essential elements upon which the rule of equity is based, which gives to the grantor the right to a rescission of the conveyance, and the presence of either one of these two elements is an absolutely paramount necessity and prerequisite to the right to a reformation of the title.

In this case both elements are absent. The consideration was full and adequate and there was no fraud in the grantee.

As a plain, human, common-sense proposition, the government of Mexico had no moral or equitable right to reform the title to this grant, or to recover any surplus lands within its boundaries, or to recover any additional price therefor.

Hence this Government cannot, almost a century subsequent to the sale and conveyance, upon any principle of law, equity, good morals, or natural justice, or in accordance with the principles of international law or within the spirit or even the letter of the Gadsden treaty, enforce a forfeiture of about eight-ninths of this grant and leave to the grantee only the remaining one-ninth thereof—and that mess of pottage to be carved out of the most worthless portion of the land.

III.

Mistakes in surveys were not confined to Spain and Mexico, but were equally common in the American colonies in the early days, and laws authorizing the surplus within a grant to be acquired by third parties existed in Virginia and were identical in principle with those of Mexico.

Notwithstanding the fact that the law permitted third parties to acquire the surplus within a grant in Virginia, it

was always held that the grantee acquired the legal title to the boundaries by the conveyance, and that until he rejected the surplus and alloted the same, or until it was divested by a judicial decree, he had an equal right to every and to each part of the land within his grant.

IV.

The excess in the grant in Mexico, as in Virginia, was "mixed up in its entirety with the *cabide legal*," and the owner had "an equal right to each and every part of the land within the boundaries described in the title papers," and the *cabide legal* was not a specific and identifiable portion of the tract of land included in the survey, but simply means the quantity of such tract of land to which the owner had an indefeasible title—*i. e.*, a title which is not only *not void*, but which is *not even voidable upon any ground*, by suit or otherwise, at the instance of the Government. As to the excess, his title *may be voidable*—*i. e.*, defeasible—but *it is not void*, and the legal title which is vested in him to the excess *can only be defeated by a judicial proceeding to forfeit the excess*, and that requires a cancellation of the entire old title and a new survey, and *the issuance to him of a new title to the land within such new survey.*

V.

"Under our form of government it is elementary that all power to reform a patent by officers of the Land Department vanishes the moment the patent has been executed, and that all irregularities on the part of the officers intrusted with the preliminary proceedings are wiped out, and that for such irregularities prior to the actual grant the Government, and not the individual, must bear the consequences."

U. S. *vs.* Arredondo, 6 Peters, 751.

"The reason of this rule is that it is the grant, and not the preliminaries, which passes legal title to the land."

Colson *vs.* Lewis, 2 Wheat., 378.

"When power is given to subordinate officers, their action upon the premises is binding on the Government. The only question which can arise is power in the officer or fraud in the parties."

Belcher *vs.* Lynn, 24 Howard, 508.

"When the law has appointed a special tribunal to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusively upon all others."

Johnson *vs.* Townslev, 13 Wall., 72.

VI.

In Mexico the judicial power to reform titles to land was vested in the land officers of the government instead of in courts, but those officers were authorized to proceed in accordance with equitable principles, usages, and customs, except in so far as these were modified by express statutory laws.

And the same principles of law and equity in regard to mere irregularities were applied by the land officers in Mexico when acting as judges in proceedings to annul or reform titles to lands, as are applied by the courts in this country in similar proceedings.

Hornsby *vs.* U. S., 10 Wall., 237.

VII.

The grant is not void because it appears upon the face of the proceedings that sixteen sitios were surveyed, because it also appears upon the face of the proceedings that the grant was made to more than four persons, or at least it does not

affirmatively appear that it was made to less than four persons, and the granting officer had power to grant more than four sitios of land in one tract, provided the total amount thereof did not exceed four sitios for each grantee.

VIII.

The grant was not void because it appears upon the face of the proceedings that sixteen sitios were appraised as only four sitios, because it also appears on the face of the proceedings that the purchase price exceeded the legal rate and appraised value of the best land within the grant for each and every one of such sixteen sitios, and hence that the government could have suffered no substantial injury from this irregularity in the preliminary proceedings to the grant.

IX.

"All lands are *supposed* to be *actually surveyed*, and the *intention of the grant* is to convey the land *according to that actual survey*."

The *reason* for the rule that quantity must yield to courses and distances, and the latter to fixed monuments and natural landmarks, is that the *intent* of the parties to the conveyance must prevail, and it is a *presumption of law* that the minds of the parties met upon the fixed monuments and natural landmarks, *because* mistakes are much *more probable and frequent* in estimating quantity or in measuring courses and distances than in fixed monuments or natural landmarks which can be described and designated so as to be ascertained with accuracy.

The *intent* of the parties in a conveyance between a State and an individual must be construed according to the same

principles of law which are applied to conveyances between individuals.

Huidekoper's Lessee *vs.* Douglass, 3 Cranch, 1.

X.

This cannot be a grant *of quantity only*, because if the survey included only three sitios and the quantity specified in the grant was four sitios, title would vest in the grantee only to the area of land actually contained in the survey, and this would make the rule unequal and unjust.

And if it is a grant of quantity only, it necessarily becomes a mere "floating grant" (*i. e.*, in effect a land warrant or land script, entitling the owner to have that specific quantity of land subsequently surveyed and the possession thereof delivered to him), and this would make the laws, requiring a prior survey of the land to be sold and a prior appraisement of the land surveyed, wholly inoperative and of no force or effect whatsoever; whereas a sale of land in Sonora without a prior survey, to delineate and mark upon the ground the land intended to be sold, would obviously have been void for want of power in the officer to make the grant.

In "floating grants" the title did not vest in the grantee to any specific land by the issuance of the title papers, but the subsequent survey and delivery of possession vested the title in the grantee to that specific piece of land; and the prior survey and delivery of possession must have had the same effect in the class of grants in the case at bar when followed by the issuance of the title papers, based upon the payment for the land.

In neither case was the Government concluded by the survey and delivery of possession from annulling or reforming the title upon equitable principles for mistakes in the survey or fraud in the parties.

XI.

The rule for the construction of grants in Mexico, and under the civil law generally, including the modified form thereof adopted in Louisiana, is identical with the rule of the common law, and under that rule this was a grant by specific boundaries and not a grant of quantity only.

XII.

The government of Mexico possessed the same right as an individual grantor (as does this Government) to recover an additional price for any excess within the grant, *if there was a partial failure of consideration*, and in the event of a default in the payment thereof, after the amount had been ascertained by a judicial decree, it had the right to a reformation of the conveyance.

The principles upon which this right was based are universally recognized in conveyances between individuals in Mexico, as well as in England and all the States of the United States.

XIII.

In Mexico the purchaser had a reciprocal right to recover back from the government a proportional part of the price paid if a resurvey of the grant was ordered upon the ground that the survey included more land than the granting officer was authorized to sell to the grantee or grantees. Has this court jurisdiction in this proceeding to decree a repayment to us of the excess in price paid by the grantee owing to the mistake of surveyor representing the Mexican government? *Will it do less?*

XIV.

A grant is complete and perfect notwithstanding the fact that it contains a large excess within its boundaries, even if this excess is due to fraud or mistake on the part of the surveyor, and it is voidable merely, and not void; and it therefore vests the title to the entire tract in the grantee.

White *vs.* Burnley, 20 How., 235.

Taylor *vs.* Brown, 5 Cranch., 234.

Dissenting opinion of Justice Sluss, of the Court of Private Land Claims, in the case of The Arivaca Land and Cattle Co., appellant, *vs.* U. S. *et al.*, No. 153, Oct. term, 1901, of this court.

Sturgeon *vs.* Floyd, 3 Richardson (S. C.), 90.

Mitchell *vs.* Smale, 140 U. S., 374.

The first two cases are conclusive upon all the questions of law involved in this case and between them involve all the facts and all the controlling principles of law applicable thereto.

XV.

The grant was complete and perfect when the title paper was issued, and the grantee could not be divested of his title to any part of the land so granted, except by a judicial proceeding.

White *vs* Burnley, 20 How., 235.

"The divestiture of title once legally vested is a judicial proceeding."

Camou *vs.* U. S., 171 U. S., 220.

XVI.

Great excesses in grants were universal in the State of Sonora and arose from the ignorance of the surveyors and the semi-civilized condition of the country, and no presumption of fraud in the grantee can be inferred therefrom.

Great excesses in grants were not unknown in this country, either; but no instance is known where the State has interfered by suit to reform a land patent solely for excess of quantity. The question here is not of reform; it is of original nullity.

White *vs.* Burnley, 20 How., 235.

XVII.

The law of the State of Sonora of 1835 operated as a legislative grant and cured any defects which may have existed in the title to this grant and confirmed the title of the grantee to the boundaries and left in the government of Mexico a mere right of action to recover an additional price upon equitable principles, or to reform the title in default of such payment, after the amount thereof was ascertained by a judicial decree. Its effect is just the same as a law in the same language passed by Congress prior to the act creating the Court of Private Land Claims would be.

And in the absence of a constitutional prohibition against the impairment of a contract, and upon principles of natural justice, this law could not be repealed so as to affect the vested rights of the grantee.

Terrett *et al. vs.* Taylor, 9 Cranch, 44.

Fletcher *vs.* Peck, 6 Cranch, 177.

But if this law did not operate as a legislative grant, it at least vested a valuable right of property and not a mere privilege. If the right to retain the whole and to pay for

the excess is a valuable property right in a conveyance between individuals, why is it not equally so in a conveyance between the government and an individual? And if it is a right of property, it is protected by the treaty, as the term property includes every species of title, inchoate or complete.

Soulard *vs.* U. S., 4 Pet., 511.
Delassus *vs.* U. S., 9 Pet., 131.

XVIII.

A legislative confirmation of a claim to land is a recognition of the validity of such claim and operates as effectually as a grant or quitclaim from the Government.

Langdeau *vs.* Hanes, 21 Wall., 521.

"The rule may be stated as a general one in respect to legislative grants in this country, that such grants should be construed in favor of the grantee, and in such a manner as to give them a full and liberal operation, so as to carry out the legislative intent where that can be ascertained."

Washburn on Real Property, vol. 3 (4th ed.), p. 190.

XIX.

No new or additional consideration is required to support a ratification or confirmation.

Drakeley *vs.* Gregg, 8 Wall., 242.

XX.

At the time Sonora passed the law of May 12, 1835, she had full power over public lands within the borders of the State, but at the time she passed the law of May 14, 1852, she had no power or authority to enact any law on this subject, because the control of the public lands within the States

had been resumed by the National Government in 1836 and was never relinquished by it at any time from that date until the present time, and said law could not have the effect of divesting the title to the excess within the grant, as the grantees were never dispossessed prior to the Gadsden treaty, and a mere declaration of law cannot have that effect, as it requires a judicial proceeding to divest tittle once legally vested.

XXI.

This court has no power to reform the title or to forfeit any part of the grant in this proceeding. It can proceed only in accordance with the Constitution and laws of this country in enforcing any affirmative relief to which the United States claims it is entitled, and it is only in determining what rights of property were vested in the grantee at the date of the Gadsden treaty that it may inquire into the laws, customs, and usages of Mexico.

White *vs.* Burnley, 20 How., 235.

The law of Sonora of May 14, 1852, merely prescribes a statutory remedy which could have been pursued by the government of Mexico prior to the treaty, *and it does not measure the property rights of the grantee unless action was taken and a decree had under it.*

For instance, if the excess within the grant does not amount to the third part of the land within the boundaries, this court could not take proof as to whether these grantees have sufficient means for stocking the excess, and it could not adjudicate them to us at the rates which were in force in Mexico at that time.

Counsel for the Government themselves exhaustively argue to this effect.

XXII.

This court has jurisdiction to determine only two questions: First, that the grant is valid or invalid, and, incidentally, whether it vested in the grantee the legal or the equitable title to any specific piece of land; and, second, where are the boundaries located which delineate and mark out that specific tract of land to which either the legal *or* the equitable title was vested in the grantee by the grant.

The first is a question of law, and the second is a question of fact.

Under the first question, if the grant was *absolutely void*, this court may so determine, and that ends the proceeding; but if it was *merely voidable*, and a question is thus raised as to what equitable rights the government of Mexico might have had to reform the title at the date of the Gadsden treaty, had the land remained under its dominion, that question can only be considered in another action brought for that express purpose, in a court having jurisdiction of the same.

XXIII.

Mexico never exercised her right, if she had any, to avoid this grant prior to the Gadsden treaty, and she might never have chosen to do so had the land remained under her dominion.

If her officers had not proceeded to do so prior to the law of 1863, they could not thereafter have proceeded in accordance with the law of 1852, even if that law was valid, and they might never have proceeded at all, in view of the fact that the price received by the Government exceeded the just value of all the land within the boundaries of the grant.

Upon what theory, therefore, will this Government now proceed to forfeit any part of this grant?

She must be guided in such a proceeding by an enlightened policy of good morals, and by at least the highest principles of equity and of natural justice that have ever been recognized by the government of Mexico at any period of her history in such proceedings.

XXIV.

Colin Cameron and Harvey L. Christie are proper parties to this action and have a legal standing in the proceedings.

XXV.

The grant was sufficiently recorded in the archives of Mexico.

Opinion of the Court of Private Land Claims in this case.

Ely *vs.* U. S., 171 U. S., 220.

The boundaries of the grant are fully established by a great preponderance of evidence at the specific points claimed by the petitioners, Cameron and Christie.

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ARGUMENT.

Gross mistakes in surveys of land and in the actual quantity contained in grants and patents based thereon were not confined to Mexico, but, on the contrary, were very common in the American colonies, and in at least one of them, to wit, Virginia, laws were passed providing for the acquisition of the surplus in a grant by other persons; but it was never supposed that by reason of this law the grant or patent did not vest in the grantee the legal title to the entire tract of land within the boundaries described in his title papers, nor was it ever supposed that by reason of such laws the grant did not vest in the grantee an equal right to each and every part of the land contained within his grant until he rejected the surplus himself and allotted it in such part of the patent as he pleased.

In Taylor *vs.* Brown, 5 Cranch, 234, Chief Justice Marshall, speaking for this court, says:

"It is a fact of universal notoriety in Virginia not only that the old military surveys, but that the old patents of that country, generally contain a greater quantity of land than the patents call for. The ancient law of Virginia notices this fact and provides for the case. It prescribes THE MANNER IN WHICH THIS SURPLUS MAY BE ACQUIRED BY OTHER PERSONS, and it is worthy of notice that THE PATENTEE MUST HIMSELF REJECT THE SURPLUS BEFORE IT CAN BE ACQUIRED BY ANOTHER, and, after having so rejected it, he has the election to allot it in such part of the patent as he please."

"The survey is an appropriation of a certain quantity of land by metes and bounds, plainly marked by an officer appointed by the government for that purpose, and it would seem that the government received his plat and certificate as full evidence of the correctness of the survey. THIS BEING THE CASE, it is admitted by the government to be an appropriation of the land it covers, and it is difficult to discern a rule by which THE SURVEY could be reduced on a

caveat by the owner of an interfering survey, unless the entry on which it was made was in such terms that the excess might be considered as surveyed contrary to location."

"FOR TO EVERY AND TO EACH PART OF THE LAND SURVEYED ITS OWNER HAS AN EQUAL RIGHT."

"It is proper to premise that there is but one species of cases in which any court of justice is authorized by our land law to divest the owner of the survey of the surplus included within its boundaries, namely, when the survey was made posterior to an entry made by another person on the same land; and TO DO MORE WOULD BE UNEQUAL AND UNJUST, inasmuch as A SURVEY WHICH IS TOO SMALL CANNOT BE ENLARGED."

The foregoing language was used in a case in which the warrant under which the survey was made was for two thousand acres, and the survey included three thousand and twenty-five acres.

The law of Virginia, above referred to, is identical in some respects with the law of the State of Sonora of 1852, and particularly as to the right of the patentee to elect to allot the surplus in such part of the patent as he pleases.

GRANT VESTED LEGAL TITLE TO ALL LAND WITHIN BOUNDARIES, VOIDABLE MERELY AND NOT VOID.

THE GRANT WAS VOIDABLE FOR THE EXCESS ON CERTAIN CONDITIONS UNDER THE LAWS OF SPAIN AND MEXICO, BUT IT WAS A GRANT BY SPECIFIC BOUNDARIES AND VESTED THE LEGAL TITLE AND FEE TO ALL THE LANDS WITHIN ITS PERIMETER IN THE GRANTEE, DESPITE THE FACT THAT QUANTITY WAS OF THE ESSENCE OF THE CONTRACT. THE RULES OF THE COMMON LAW AS APPLIED IN ENGLAND AND THE UNITED STATES AND THE RULES OF THE CIVIL LAW AS APPLIED IN SPAIN AND MEXICO AND UNDER A MODIFIED FORM IN LOUISIANA ARE IDENTICAL IN THESE RESPECTS IN CONVEYANCES

"Whether such patent conveyed a valid title or not it divested the title of the United States so that the patentee or his grantees being in possession under claim and color of title, the statute of limitations began to run in their favor."

Bicknell *vs.* Comstock, 113 U. S., 149.

FROM THE GOVERNMENT TO AN INDIVIDUAL AS WELL AS IN CONVEYANCES BETWEEN INDIVIDUALS.

IN MEXICO, BETWEEN INDIVIDUALS, THE RULE IS IDENTICAL WITH THAT OF THE COMMON LAW—THAT IS TO SAY, IF A SALE OF REAL PROPERTY IS MADE FOR A FIXED PRICE OR LUMP SUM AND WITHOUT ESTIMATING SPECIALLY THEIR PARTS OR MEASURES, THERE SHALL BE NO GROUND FOR A RESCISSION, ALTHOUGH IN THE DELIVERY THERE SHOULD BE A DEFAULT OR EXCESS.

Hall's Mexican Law, p. 574, sections 2106, 2107, 2108, 2109, and 2110.

In this connection it is worthy of notice that in Mexico, as between individuals, the vendor had a right to recover an additional purchase price, even when the sale was not made BY ESTIMATING SPECIFICALLY THE PARTS OF MEASURES, if it afterwards transpired that the sale was made for less than one-half THE JUST PRICE OF THE GRANT AT THE TIME OF THE SALE, and if the vendee would not pay the balance of what IT WAS REALLY WORTH AT THE TIME OF THE SALE, after the amount thereof had been ascertained by a judicial decree, the seller was entitled to a rescission of the conveyance upon repaying to the vendee the purchase-money which he had received; but IN NO EVENT COULD THE VENDOR RESCIND HIS CONTRACT OF CONVEYANCE OR RECOVER BACK ANY PART OF THE PROPERTY, *if the vendee was willing to pay the additional price.*

Hall's Mexican Law, p. 478.

It is also worthy of notice that as between individuals in Mexico, if the vendor wishes to sell his property, BUT WAS IGNORANT OF ITS VALUE, HAVING NEVER SEEN IT, AND IF THE VENDEE ACTED FRAUDULENTLY BY CONCEALING SOMETHING FROM THE VENDOR AT THE TIME THE VENDEE INDUCED THE VENDOR TO MAKE THE SALE, THE VENDOR COULD OBLIGE THE VENDEE TO INDEMNIFY HIM FOR THE FRAUD PRACTICED UPON

HIM BY PAYING TO THE VENDOR THE JUST PRICE FOR THE THING SOLD, BUT IN NO EVENT WAS THE VENDOR ENTITLED TO A RESCISSION OF THE SALE UNLESS THE VENDEE NEGLECTED OR REFUSED TO PAY THE AMOUNT OF SUCH DAMAGES TO THE VENDOR AFTER THE SAME HAD BEEN ASCERTAINED BY A JUDICIAL DECREE.

Hall's Mexican Law, pp. 478 and 479.

And it is still more worthy of notice that as between individuals the vendor had no right to rescind the conveyance after the delivery of the property for want of payment of the price, even if the deed expressly provided that if the price was not paid at the time agreed a dissolution should take place. On the contrary, in such case the purchaser had the absolute right to make the payment, even after the expiration of the time fixed therefor in the contract or conveyance, unless that right had been cut off by an injunction from a court of competent jurisdiction in a judicial proceeding instituted expressly for that purpose.

Hall's Mexican Law, sections 2125 and 2126, p. 577.

APPLYING THESE RULES AND PRINCIPLES OF LAW AS THEY EXISTED IN SPAIN AND MEXICO BETWEEN INDIVIDUALS FROM TIME IMMEMORIAL, IN SO FAR AS OUR MODEST RESEARCHES HAVE THROWN ANY LIGHT ON THE SUBJECT, WE CAN REACH NO OTHER CONCLUSION THAN THAT THE CEDULA OF 1754 AND THE LAW OF SONORA OF MAY 12, 1835, WERE MERE STATUTORY DECLARATIONS ESTABLISHING THE RULE OF THE CIVIL LAW OF SPAIN AND MEXICO, AS IT EXISTED BETWEEN INDIVIDUALS, AS THE JUST MEASURE OF THE RECIPROCAL RIGHTS OF THE GRANTOR AND GRANTEE WHERE THE SALE WAS BETWEEN THE GOVERNMENT AND AN INDIVIDUAL AND WAS FOR A VALUABLE CONSIDERATION.

THE ONLY DIFFERENCE WHICH SEEMS TO EXIST BETWEEN SUCH A SALE AND ONE BETWEEN TWO INDIVIDUALS IS THAT THE RIGHTS OF THE GOVERNMENT WERE NOT CUT OFF OR IN ANY WAY IMPAIRED BY LACHES, WHEREAS THOSE OF AN INDIVIDUAL MIGHT BE. The only additional effect of the cedula of 1754 and of the law of Sonora of May 12, 1835, was to CONFIRM and validate all invalid grants then existing or which might thereafter be made—at least as to mere irregularities and mistakes on the part of its officers—subject to rescission by judicial proceedings if so excessive as to amount to ACTUAL FRAUD by construction, and the statute left this question to be determined by the well-settled general principles of equity. It is to be noted that the cedula of 1754 expressly uses the term "CONFIRMATION," and we shall presently see that the law of Sonora of 1835 was a statute of peace, enacted to quiet titles by confirming all existing grants to their boundaries.

IT IS A UNIVERSAL RULE OF LAW IN ENGLAND, THE UNITED STATES, AND MEXICO (AT LEAST AS BETWEEN INDIVIDUALS IN THE LAST-NAMED COUNTRY) THAT IN ALL CASES WHERE QUANTITY IS ACTUALLY OF THE ESSENCE OF THE CONTRACT OF SALE, AND WHERE NEITHER THE PURCHASER NOR THE SELLER IS ESTOPPED BY SOMETHING APPEARING IN THE DEED ITSELF by which the certain rules of law require the contract to be construed as embodying a waiver of the reciprocal rights of the parties in regard to the quantity, the *purchaser* can recover *from the seller* the value of any deficiency of quantity in the grant, or can, AT HIS OPTION, rescind the contract and recover the purchase-money already paid on it by him. THE SELLER, however, only has the right TO RECOVER THE VALUE OF ANY EXCESS OF LAND which may be included in the conveyance, WITHOUT ANY RIGHT TO A REFORMATION OF THE DEED, OR TO RECOVER ANY PARTICULAR PORTION OF THE TRACT CONVEYED, unless THE PURCHASER NEGLECTS OR REFUSES TO PAY THE ADDITIONAL

PRICE AFTER THE AMOUNT THEREOF HAS BEEN DETERMINED BY A JUDICIAL DECREE.

Washburn on Real Property, vol. 3 (4th ed.), pp. 491 to 495.
Powell *vs.* Clark, 5 Mass., 356.
Noble *et al. vs.* Googins, 99 Mass., 231.
Thredgill *vs.* Pintard, 12 Howard, 35.
Tarbell *vs.* Bowman, 103 Mass., 343.

But it has never been supposed that this right in a seller to recover an additional price for a surplus or excess when quantity is of the essence of the contract and when he is not estopped, and this right to have the conveyance reformed if the purchaser refuses or neglects to pay the additional price after the amount has been duly ascertained by a judicial decree, or that this right in a seller to avoid the sale by returning the purchase price already received if the purchaser refuses to pay the additional price after such judicial ascertainment of the amount, operates to in any way modify the rule of law that when metes and bounds are specified in the conveyance the seller is conclusively presumed *by certain rules of law* to have INTENDED *to convey the entire tract of land so described*, because the intent of the parties must control, and the presumption must prevail that the minds of the parties met as to the tract of land to be conveyed, upon the natural landmarks and artificial monuments described in the title papers, as these must be presumed to have arrested and fixed their attention, BECAUSE it is much more PROBABLE that the parties might have made a mistake as to quantity than as to courses and distances, or as to courses and distances than as to natural landmarks or permanent artificial monuments.

In construing the language of this grant, in order to reach the *intent* of the parties we must bear in mind the one fact of paramount importance, that according to the laws then in force the granting officer had no power to make a sale

of an unlocated quantity of land within outboundaries, and hence if he attempted or *intended* to do so the grant so made would be void. We must bear in mind the further fact that it was the universal custom in that country for the petitioner to himself *name* his ranch, either in his petition or *at the time of the survey.* In this case we see from the expediente that Bustillo merely petitioned for land on the north and on the east of the presidio of Santa Cruz. The place *had no name* until he gave it one *at the time of the survey.* He then fixed the place from which he wanted the surveyor to commence the survey, and he then gave to the tract of land to be surveyed the name "San Rafael" de la Zanja—*i. e.*, of the ditch—calling it that, as the evidence shows, because there was a natural ditch near that center which was generally spoken of as "La Zanja."

Sometimes the petitioner adopted a name by which the locality had been previously known, but more frequently the name was his own arbitrary choice, and thereafter that name was always applied by people generally to that ranch. If a Mexican says he is going to "Babacomari," or to "Sonoita," or to "Canoa," or to "Agua Prieta," or to "San Rafael" de la Valle, or to "San Rafael" de la Zanja, he means that he is going to the ranch of that name. This is a universal mode of expression among both the educated and uneducated Mexicans, and every ranch in Sonora has a name which applies solely to the tract of land embraced within the grant. Of course, when the owner has a home upon the grant the Mexicans used the name also to indicate that home; hence when he says he is going to "San Rafael" de la Zanja, he means that he is going to the house occupied at that particular time by the owner of the grant. The "*Toma de Razon*" of the grant was always made on this theory by the Mexican officials.

Referring now to the expediente of this grant, we find that the surveyor proceeded to measure and locate a tract of land to be appraised and sold as four sitios, and that in doing so

he obviously measured at least sixteen sitios, and after running a line around from corner to corner to inclose the tract he had surveyed, he concludes by saying:

"*With which measurements was formed the square of the four sitios registered by Don Manuel Bustillo* for raising cattle; and *as such he accepted them*, being informed that in due time he was to establish his boundaries with monuments of lime and rough stone as required by law."

Referring again to the expediente of this grant, we find in the petition a request that the intendente be pleased to give the necessary order for the *measurement of the said land*—that is, for the measurement of a tract of land which the petitioner desired to purchase. Here is the language: "Wherefore, I pray your honor that for *the measurement of* "*the said tract of land* you will be pleased to issue the neces- "sary orders to the proper officers, and that the commis- "sioner may take into consideration in *its* valuation that *the* "*tract of land asked for* borders upon the country of the "Apaches, who are constantly hostile." Immediately after the petition we find an order that "the commandant of the "company of Santa Cruz will proceed to *the measurement of* "*the lands petitioned for*, summoning the adjoining land- "owners, and appointing experts for *the valuation of the said* "*lands.*

Can anybody doubt that it was the intention of the government to survey and appraise the identical land which it intended to sell? And again, in the "act of acceptance" by the commissioner appointed to survey we find the following: "I ordered that the neighboring land-owners be sum- "moned, and accompanied by the necessary officers, who "are named, I appoint tomorrow as the day for the com- "mencement *of the measurements of the four sitios* for rais- "ing cattle in the place called La Zanja, as before stated." And again, in the notification to the interested parties, the expediente says: "I, the said commissioner, for the purpose

"of proceeding to *the measurements of said lands*, appointed "as officials to make the same," etc.

And in the proceedings of valuation of the land we find the following: "Whereupon I, the said commissioner, for "the purpose of *valuing the lands measured by me*, for Don "Manuel Bustillo, *which lands are* situated at San Rafael de "la Zanja, *composed of cuatro sitios para cria de ganado mayor*, "said that I would appoint and did appoint, as such ap- "praisers," etc.

Will it be argued by counsel for the Government that the appraised value of the lands which were to be sold was not *the appraised value of the land which was actually surveyed and measured?* How can language make it plainer? The commissioner says he appointed appraisers to value "*the lands measured by me.*" Did they value some other and different lands from those which were measured by the commissioner, or did they value or appraise only a part of the lands which had been measured by the commissioner? Are we to so argue simply because the commissioner tells us that *the lands measured by him* were composed of four sitios? And again, in the decree of publication for thirty days we find the following: "I, the said commissioner, in view of the "foregoing *proceedings of measurement and valuation of the* "*land of the San Rafael de la Zanja*, comprising four sitios, I "said that publication should be made for thirty consecutive "days," etc.

Here we have the statement that he had *measured and valued the lands which had been petitioned for*, and that *the lands as measured contained four sitios.*

And in the first offer of sale we find the following: "The "lands *of the place called San Rafael de la Zanja*, situated "within this jurisdiction *and containing four sitios* for raising "cattle, *surveyed in favor of Don Manuel Bustillo*, of this town, "*appraised* at two hundred and ten dollars, are for sale on "account of the public treasury," etc.

What does this language mean, except that the auctioneer

was offering for sale the particular tract of land which was surveyed in favor of Don Manuel Bustillo, and the particular tract of land which had been valued or appraised at two hundred and ten dollars, and which tract so surveyed had been named "San Rafael de la Zanja" by Bustillo? We have already seen that the tract which was appraised was the tract which had been surveyed, and the tract which was surveyed was the tract which was named, and hence it is quite clear that the tract offered for sale was the tract which had been surveyed. No other tract than the tract which had been surveyed, and which, after being surveyed had been appraised, could be sold without violating the laws relating to such sales, and hence it must be clear that the *intent* of the Government was to sell the tract which had been surveyed and marked upon the ground and which is described in the expediente, *and that Romero believed he was bidding for that surveyed tract and based the amount of his bid on that belief.*

Then follows the testimony of the witnesses that Don Manuel Bustillo possesses sufficient means "to stock the "place of San Rafael de la Zanja which had been petitioned "for by him." The place petitioned for was surveyed to him, and the place surveyed was appraised, and the place surveyed and appraised was sold, and hence the testimony of the witnesses all goes to the fact that Don Manuel Bustillo possesses sufficient means to stock the place which had been marked or surveyed, or, in other words, to stock the tract of land which is specifically described in the expediente.

And again, the report of the promotor fiscal states that he "has examined with much care this expediente in rela- "tion to the *lands surveyed* for Don Manuel Bustillo * * * "at the place named San Rafael de la Zanja, in the same "jurisdiction, *from which survey resulted* cuatro sitios para "cria de ganado mayor, *which* were valued by two experts, "who for that purpose were appointed, at the rate of $60.00 "for three thereof, for the reason that they had running

"water, and the fourth, which was without running water, "and which could be watered by wells, at $30.00 which two "sums together make two hundred and ten dollars; and "*which land* having been offered for sale at public auction, "for thirty consecutive days," etc.

What idea does this language convey to the ordinary mind? Does it not say that the attorney general has examined the proceedings relating to *the survey of the tract of land which Bustillo petitioned for*, and that *said tract of land was surveyed* at the place named San Rafael de la Zanja, and that *the land so surveyed* is of the area of four sitios, and that *the land so surveyed* was valued at $210, because on three parts of *the land so surveyed* running water was found, and that on another part of *the land so surveyed* water could only be secured by wells? And does it not further say that *the land which had been surveyed* had been offered for sale at public auction for thirty consecutive days?

Bearing in mind the laws and customs of the country, if this language does not establish the fact that the Government intended to sell *the land which was surveyed*, then words no longer convey any meaning to the human mind. Do counsel for the Government mean to tell us that the attorney general for Mexico intended by this language to say that four sitios of land had been offered for sale at public auction, which had never been identified or marked upon the ground, and that the intent to sell a quantity of land, and not a specific tract of land, is apparent on the face of these proceedings? *Quantity is an abstract idea, and land is a concrete thing.* It was the *thing* which was to be sold—*i. e., the land.* But what particular *land? Obviously the specific piece of land which had been surveyed.* It is impossible to appraise an *abstract idea.* It was the *thing—i. e., the surveyed tract of land—which was appraised.*

And again, in the order of sale which was made by the intendente, we find the following:

"In accordance with the report of the promotor fiscal of this intendencia, as shown in the foregoing, let the three public offers of sale be made of *the lands referred to in this expediente*, first summoning the interested party."

What lands were ordered to be sold? Any four sitios of land in the vicinity of "San Rafael de la Zanja" or within certain outboundaries? Certainly not. There was no place of that name prior to the survey. The lands ordered to be sold are those *referred to in the expediente*, to wit, in the report of the promotor fiscal. What lands are referred to in the report of the promotor fiscal? Obviously the lands surveyed for Don Manuel Bustillo, at the place he named "San Rafael de la Zanja," from which measurement resulted four sitios, and which surveyed tract had been appraised at $210.

And again, in the first offer of sale, we find the following: "At the city of Arizpe, on the eighth day of the month of "January, one thousand eight hundred and twenty-two, the "board of sale, composed of the señor intendente *ad interim* "as president thereof, and the members composing the same, "being assembled, for the purpose of making the first offer "of sale of the lands referred to in their proceedings; at the "sound of the drum many persons were assembled at the "office of this intendencia, in the presence of whom the auc-"tioneer, Soreto Salcedo, was ordered to make, and did in "fact make, an offer in a clear voice, saying: 'There are to "'be sold in this board of sale four sitios of land *comprised* "'*in the place named San Rafael de la Zanja*, situated in "'the jurisdiction of the presidio of Santa Cruz, *surveyed in* "'*favor of the one who denounced them*, Don Manuel Bustillo, "'and appraised in the sum of $210.00, being at the rate "'of $60.00 for said three sitios, and the remaining one at "'$30.00.'"

What is the meaning of this language, and what lands were offered for sale? Obviously the lands which had been surveyed for Don Manuel Bustillo and the particular lands

which had been appraised; and, in this connection, I ask, which four sitios out of the thirty-five sitios contained within the boundaries of this grant were appraised and valued by the experts? If the appraisers believed, and we are bound to conclude that they did believe, that only four sitios of land were contained within the boundaries described in the expediente, how is it possible for a person to now declare that those appraisers valued any particular four sitios of land contained within that area?

If they did not appraise some particular four sitios of land within that area, how can it be argued that the sale was of some indefinite and unlocated tract of four sitios of land within said measurements? And again, I say, that obviously *the land offered for sale was the tract which had been measured and surveyed*, and hence that is the land which was sold, and that is the land for which Romero bid $1,212. and that is the land which he purchased.

Next comes the application of Romero for the issuance of title to him "for the lands of San Rafael de la Zanja referred "to in these proceedings." In other words, he petitions for a title to the lands which had been measured, surveyed, appraised, and sold.

Next follows the decree by the intendente, in which we find the following: "The señor intendente *ad interim* of this "province of Sonora and Sinaloa, Don Ignacio de Bustamente, "having examined *the proceedings of survey, appraisement*, "publication, and sale of *the* four sitios of land *comprehended* "*in the place named* 'San Rafael de la Zanja,' situated in the "jurisdiction of the presidio of Santa Cruz, sold to Don "Ramon Romero and the other citizens of the same military "post," etc. If this language does not mean that the tract of land which had been surveyed, and which had been appraised and published, had been sold to Romero, it is idle to attempt to express anything by the medium of words. If we are to conclude that no particular tract of land was sold because it is stated that the tract which was surveyed

and appraised and sold contains four sitos of land, we must find some other medium than words for the expression of ideas. The intendente proceeds to decree "the said land "to the said Don Ramon Romero and the citizens of Santa "Cruz." And he further declares that Romero shall pay into the public treasury the sum of $1,297 six reales and five giems in the following manner: "$1,200.00, *the amount "for which the said land was sold* by the intendencia."

If language means anything, we must construe the words "the said land" as meaning the tract of land which had been measured and surveyed.

The plain intent of the grantor was to convey the particular tract of land which the government had caused to be surveyed. To presume any other intent upon its part is to presume fraud on the part of the government itself. This intent is no less clear, express, and manifest because both parties to the instrument supposed and believed that the tract which had been surveyed contained only four sitios of land instead of thirty-five sitios. This intent is no less clear, express, and conclusive because the government officers ordinarily and usually made mistakes as to the quantity of land contained within each tract which was surveyed by them in accordance with law for the very purpose of making a sale of the particular tract of land so surveyed.

This intent is made still more clear and manifest from the fact that *if the tract of land so surveyed for sale had in any instance actually contained a less quantity of land than that stated in the title papers, the grantee would have secured title only to the tract of land therein described,* and would have had no right of action against the government for a deficiency in the quantity, and the survey could not have been enlarged and no principle of equity would require that it should, *because he clearly based the amount of his bid on his estimate of the value of the tract of land which he knew was contained within the boundaries of the survey.*

This *intent* to convey the particular tract of land which

was measured, and which is described in the granting papers, is no less clear, express, and conclusive because the laws, usages, and customs in force at the time of the grant permitted the government to demand from the grantee an additional payment for any excess of quantity which might afterwards be discovered to exist within the boundaries of the tract of land which had been so measured, surveyed, located, sold, and conveyed.

The right of the government to recover the value of such excess, and to reform the grant if the grantee refused to pay for the same, *is based upon the theory that quantity was of the essence of the contract, and not upon the theory that the granting papers did not pass the legal title to all the lands contained within the boundaries* set forth and described in the expediente, *or that it was not the intent to convey the specific tract of land surveyed.*

Possession was one of the highest evidences of title known to the civil as well as to the common law; and "the survey and possession of a grant are open and public acts and would support the parol evidence of its prior existence and destruction. It would show the knowledge of the officers of the government of the title claimed and their acquiescence in the justice and legality of the claim."

U. S. *vs.* Castro *et al.*, 24 How., 350.

If this principle is true as to the whole and when the record and title are lost or destroyed, why is it not equally potent to at least establish *the intent of the parties* by their practical construction of the meaning of the title papers in this case?

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It is quite clear that, under the Mexican laws, if A sells a tract of land to B, stating in the deed that it contains a certain quantity, and describing the land by metes and bounds, A can recover from B the value of any excess of quantity which may be contained within the boundaries of the tract described in the conveyance, provided that it appears that quantity was of the essence of the contract. That is likewise the law in the United States, and it has been the law in England for 200 years or more. But will it be argued that in such a case the legal title to all the land described in the conveyance did not pass out of A and into B by the delivery of the title papers? Undoubtedly not. The title to the entire tract of land is vested in B, and A merely has an equitable right to recover the value of the excess, and such value must be determined by the rate per unit agreed upon by the parties to the transaction originally, if such fact exists, and otherwise it must be equitably determined.

So, in all these Mexican grants, the title to the entire tract of land which is described in the title papers became vested in the

grantee. I need only refer to the brief of counsel for the Goverment to demonstrate that this is true.

At page 33, section 47, counsel quote article 1, chapter 1, of the Mexican law of 1894, as follows: "The lands dealt "with in this law which are national property shall for the "purpose required be divided into the following categories: "1. Vacant lands. 2. Surplus lands (demasias). 3. Excess "lands. 4. National lands."

Surplus lands (demesias) are defined by this law (article 3), say counsel for the Government, "to be *those held by* "*private persons on primordial title and to a greater extent* "*than specified,* such surplus, however, *being within the* "*boundaries mentioned in the title, and consequently mixed up* "*in its entirety with the area for which a title is held.*"

Justice Miller, in delivering the opinion of the Supreme Court in the Maxwell Land Grant case, 121 U. S., 325, said:

"The phrase 'outboundary' has its proper use in regard "to certain classes of Mexican grants, but it is wholly inap- "plicable and misleading as referring to the one now under "consideration. There is nothing in the language of the "grant, nor in the petition, nor in anything connected with "it, nor in the act of judicial possession, to indicate that "any one had any idea or conception that the grantees "were not to have all the land within the boundaries estab- "lished by that judicial possession."

It seems to us that this language applies with full force to this grant and proceedings now under consideration.

"That a case of excess sufficiently gross could arise to justify a proceeding by suit on the part of the State of Texas (or of the United States) to reform a Spanish grant we do not doubt (U. S. *vs.* Hughes, 11 How., 552). But the question here *is not of reform; it is of original nullity.*"

But even in such a case the right of the government to reform the title *would depend upon equitable principles*, and if it appeared that the mistake of the government's surveyor misled the purchaser into bidding and paying the full value of the entire quantity of land contained within the survey and grant, a reformation certainly could not be had without returning to the grantee the excess of purchase price which he thus paid, and a reformation could not be had even on those terms, unless some strong ground of public policy required it.

And certainly that would not be so in this case, because much larger tracts of land of the same character are held by private parties throughout the United States, without detriment to the public welfare; and it certainly was not the case while the land remained in Mexico, as it belonged to all the residents of the town of Santa Cruz in common, and, if allotted, the quantity to go to each one was very small, and they needed it for their cattle, for grazing purposes, and it was a matter of great importance and of the highest public policy for Mexico to encourage the maintenance of this frontier settlement of Santa Cruz, which was several times destroyed by Indians, and which to a considerable extent prevented the Apache Indians from raiding further south into the interior farming regions of Sonora.

It rested *with the conscience of the political arm of the government in Mexico* as to whether it would *reform a title for excess or not and upon what terms it would do so.*

It likewise rests *with the conscience of the political arm of this Government* as to whether it will *reform the title to Spanish or Mexican grants and upon what terms it will do so.*

And Congress has not yet declared its will in this respect.

This was a "*perfect*" grant at the date of the Gadsden treaty, as we shall presently show, and today *it requires no action on the part of this court* (as it is excluded from the conditional limitations of the act creating the Court of Pri-

vate Land Claims, except in respect to the condition that the patent of confirmation shall exclude the minerals).

So far as the rights of individuals are concerned in construing statutes, treaties, contracts, and written instruments generally, the courts adopt a liberal construction, and if the statute or treaty admits of two constructions, one restrictive of the rights that may be claimed under it and the other liberal as respects such rights, the latter is to be preferred.

1 Kent Com., 174.
Sharkes *vs.* Dupont, 3 Pet., 242.
Hauenstein *vs.* Lynham, 100 U. S., 483.
The Amiable Isabella, 6 Wheat., 1.
U. S. *vs.* Perchman, 7 Pet., 832.
North German Lloyd S. S. Co. *vs.* Hadden, 43 Fed., 20.
U. S. *vs.* Payne, 8 Fed., 892.

"Aside from the duty imposed by the Constitution to respect treaty stipulations (and it may be added to protect private rights of property generally) when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the Government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected; and it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the Government were it to doubt for a moment that these considerations were present in the minds of its members when the legislation in question was enacted."

Chew Heong *vs.* U. S., 112 U. S., 536; opinion by Justice Harlan.

If Congress intended to confer upon the Court of Private Land Claims the right to reform titles to "*perfect*" grants, why were the owners thereof not required to submit their claims to that court? As a matter of fact, were not "*perfect*"—*i. e.*, completed—grants (White *vs.* Burnley, 20 How., 235) omitted from the requirements of the act of 1891 for

submission to the Court of Private Land Claims, because, in the opinion of Congress, such grants require no act of confirmation to enable the owner to protect his title in the courts of ordinary and general jurisdiction? And if the Government of the United States brought suit in a court of general jurisdiction to reform the title to this grant, it would be estopped by its laches in accordance with the principle laid down in the case of U. S. *vs.* Hancock, 133 U. S., 193, where a delay of 15 years in bringing suit to reform a patent for an excessive mistake in the survey upon the ground of fraud and collusion between the surveyor and the grantee was held to bar the United States for laches, and it would be estopped by its conduct in the matter of taxes, as he who asks equity must do equity, and as in such suits the Government is on an exact equality with individuals and is subject to the same rules of law and equity.

U. S. *vs.* Iron Silver Mining Co., 128 U. S., 677.
Maxwell Land Grant case, 121 U. S., 325.

Moreover, the United States in such a suit would be compelled to show an equitable ground for a rescission—*i. e.*, a partial failure of consideration or some other substantial injury arising from the mistake of the surveyor in this grant,—and that we have seen cannot be done; *and it would likewise be required to refund an equitable proportion of the purchase price as a condition precedent to the reformation.* Can this court render such a decree? *Will it do less?*

"*The United States have never sought, by their legislation, to evade the obligation devolved upon them by the treaty of Guadalupe Hidalgo, to protect the rights of property of the inhabitants of the ceded territory, or to discharge it in a narrow and illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulations of the treaty, the law of nations, the laws, usages, and customs of equity, and the decisions of the Supreme Court, so far as they are applicable. They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to*

the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which they could have claimed from the government they superseded."

U. S. *vs.* Agricola, 1 Wall., 358.

"All courts ought to feel a disposition to support a grant fairly made for a valuable consideration," says Chief Justice Marshall in Blake *vs.* Doherty, 5 Wheat., 362.

The quantity of the excess contained within the survey does not affect the principle of law involved.

In Taylor *vs.* Brown, 5 Cranch, 251, Chief Justice Marshall says:

"There is but one species of cases in which any court of justice is authorized by our land law to divest the owner of a survey of a surplus included within its boundaries, namely, where the survey was made posterior to an entry made by another party on the same land, and to do more would be unequal and unjust, inasmuch as a survey which is too small cannot be enlarged."

In Mitchell *vs.* Smale, 140 U. S., 374, this court held that the grant was one by specific boundaries and not by quantity, although the grantee had purchased and paid for only four and fifty-three hundredths acres, whereas the grant was in the district of Chicago, containing twenty-five acres additional of dry land outside of the survey, as well as a large area of land under the lake in front of the bank. This additional dry land existed both at the time of the survey and of the sale and patent, thus making an excess in the grant of five and a half times the quantity of land mentioned therein, as to the dry land alone, and thus making the grant more than six times as large as the quantity specified in the title papers, as to the dry land alone.

The language of the patent in this case was "the S. W. fractional quarter of fractional section 20 in township 37,

range 15, in the district of lands subject to sale at Chicago, Illinois, containing 4.53 acres according to the official plat and survey of the said lands returned to the General Land Office by the surveyor general."

The obvious principle involved is that the sale was not one by quantity, because the land which it was intended to convey is identified and severed from the other public lands by the survey, and the particular land so intended to be conveyed is specifically identified by the official plat of the survey, which is on file in the General Land Office.

In what respect does this differ from the sale of the grant in question? What difference is there in legal effect between the language of that patent and the statements contained in the titulo of this grant, which is as follows to wit:

"There is hereby conveyed to Ramon Romero—

"*The lands of the place called San Rafael de la Zanja* (the S. W. fractional quarter of fractional section 20 in township 37 range 15) *situated within this jurisdiction* (in the district of lands subject to sale at Chicago, Illinois) *and containing four sitios for raising cattle* (containing 4.53 acres) *surveyed in favor of Don Manuel Bustillo, of this town* (according to the official plat and survey of the said lands returned to the General Land Office by the surveyor general) *appraised at two hundred and ten dollars.*"

And he might have added, *the record and sworn evidence of which proceedings of survey are attached to and incorporated in and made a part of this titulo, as well as of the original expediente*, which is retained in the archives of this government of Mexico as perpetual evidence of the grant, *and by which expediente and titulo alone can it be ascertained what specific land was appropriated and segregated from the public domain* and sold to Ramon Romero by these proceedings.

The construction placed upon the grant by this court in Mitchell *vs.* Smale has become a rule of property and ought to be overturned only upon very grave and momentous rea-

sons. The reasons for the rule of *stare decisis* apply with full force and vigor.

In the case of Sturgeon *vs.* Floyd, 3 Richardson (S. C.), 90, the quantity called for in the title papers was fourteen thousand nine hundred (14,900) acres, and the actual area contained within the perimeter of the grant was one hundred and thirty-six thousand (136,000) acres, or more than nine times the quantity specified in the title papers, and the court affirmed the grant, which had been made by the State to an individual, as a grant by specific boundaries, and as thus including the entire quantity of land found within the perimeter.

The Maxwell Land Grant case, 121 U. S., 325, is also instructive.

These are mere examples of many cases which could be cited illustrating the universal application of the principle of law for which we contend.

LAND OFFICERS IN MEXICO JUDICIAL OFFICERS.

"UNDER OUR SYSTEM OF GOVERNMENT ONE OFFICER OF THE LAND OFFICE IS NOT COMPETENT TO CANCEL OR ANNUL THE ACT OF HIS PREDECESSOR; THAT IS A JUDICIAL ACT AND REQUIRES THE JUDGMENT OF A COURT."

Stone *vs.* U. S., 2 Wallace, 525.

"Under Spanish and Mexican governments the judiciary had no authority to interfere at all in any case. The political power retained to itself all the power to reform or annul titles."

White *vs.* Burnley, 20 How., 247.

"The tribunal and courts of justice being authorized solely

for applying the laws, shall never interpret the same or suspend their execution."

Constitution of the State of the West, which comprised the present States of Sonora and Sinaloa.

In the letter which was written in 1839 by Jose Maria Mendoza, as Superior Chief of the Treasury of the Department of Sonora, to the Secretary of State of the National Republic, and which appears on pages 83, 84, 85, 86, and 87 of the "official report on the condition of the archives or records of the titles to land grants in Arizona and similar grants in Mexico," compiled by Special Agents Will M. Tipton and Henry O. Flipper, and which was put in evidence by the Government in the Ely case, the following statements occur, and they are undoubtedly correct:

"In the time of the Spanish government, the intendentes were JUDGES, with exclusive jurisdiction over lands, with ample powers under their ordinances and under the instructions of the bureau to decide and adjust matters and causes pertaining thereto and EVEN TO ADMINISTER JUSTICE, AS THEY DID ADMINISTER IT IN THEM, hearing the parties and their attorney general of the treasury, and deciding said causes upon the advice of their ordinary legal advisers;" et cetera. . . . "My predecessor Ignacio Tralles came to believe that said authorities and the treasury exercised judicial functions under those decrees" (*i. e.*, the laws recited in the letter relating to the sales of public lands).

In the official report of the minister of public works to the Chamber of Deputies of Mexico, 1885, pages 9, 10, and 11, in referring to the law of July 22, 1863, the minister says:

"In order to carry on the investigation of said overplus (demasias) it is necessary to comply with all the provisions of said laws of July 23, 1863, and of the 15th of September 1883, FOLLOWING THE JUDICIAL PROCEDURE PROVIDED IN THE SAME. Consequently no kind of abuses can be committed, there being therefore NO CAUSE FOR THE ALARM

AMONG OWNERS WHICH HAS BEEN SPOKEN OF ON THE FLOOR OF THAT CHAMBER."

Even in Mexico we see, therefore, that these laws were looked upon by the owners of grants as acts of confiscation, and yet counsel for the Government urge this court to adopt them as equitable rules for its guidance.

The expediente of this grant begins with the following statement, to wit:

"Whereas article 81 of the ordinance of intendents of the 4th of December, 1786, confers on these magistrates cognizance and jurisdiction of surveys, sales, and adjustments of lands in their respective districts, the tenor of which is literally as follows:

"ART. 81. *The intendents shall also be judges with exclusive jurisdiction over all matters and questions* that arise in the provinces in their districts, *in relation to the sale, adjustment, and distribution of Crown and manorial lands. The holders thereof and those who seek new grants of the same shall set up their rights and make their applications to said intendents who,* after the matter has been duly examined into by an attorney of the royal treasury appointed by themselves, *shall take action thereon in accordance with law* and with the assistance of their ordinary legal advisers. They shall admit appeals to the superior board of the treasury or, should the parties in interest fail to employ that recourse, submit report thereto, together with the original proceedings, when they consider them in condition for the title to be issued. The board shall, after examination thereof, return them either for the title to be issued, if no correction is necessary, or before doing so for such other proceedings as in the opinion of the board are required, with the necessary instructions. In the meantime, and without further delay, the necessary confirmation may be made, which said superior board shall issue at the proper time, proceeding in this matter, as also the intendents, their deputies and others, in accordance with the requirements of the royal instructions of October 15th, 1754, *in so far as they do not conflict with the present instructions,* without losing sight of the wise provisions of the laws therein cited, and of law 9, title XII, Book 4."

In short, the intendents were *judges* clothed with *exclusive jurisdiction to entertain suits to annul or reform titles to land as between the government and its individual grantees.* They were directed, in hearing and determining these suits, to proceed "*in accordance with law;*" but in making "*confirmations*" they were required to proceed in accordance with the requirements of the cedula of 1754, *in so far as those requirements do not conflict with said article 81 of the ordinance of intendents of the 4th of December, 1786.*

In other words, in trying suits to annul or reform titles to land, these judges were instructed by this law to decide such suits "*in accordance with law,*" and not to allow the requirements of said cedula of 1754 to control their actions, except in so far as it did not conflict with these instructions to proceed "*in accordance with law.*"

We must inquire, therefore, as to what was meant by the words "*in accordance with law.*"

In the case of Phelps *vs.* The City of Panama, 1 Wash. Ter., 533, the court said:

"The term *laws* includes not only written expressions of the governing will, but also all other rules of authority and conduct in which the supreme government exhibits, and according to which it exerts, its governmental force."

This definition clearly includes the principles of equity, as well as the usages and customs of the particular country.

In U. S. *vs.* Arredondo, 6 Peters, 714, this court said:

"The courts not only may, but *are bound to notice and respect general customs and usage as the law of the land, equally with the written law, and when clearly proved, they will control the general law.*" * * *

The statutory enactments of Spain, Mexico, and the State of Sonora measured the *remedial rights of the government* and were not intended to define all the rights of the grant owners, or to rigidly restrict the official clothed with the judicial

power to hear and determine suits to reform titles to a strict technical construction of the vested rights of such owners of grants, in accordance with said statutory laws. Those judicial officers were clothed with large discretionary powers in this respect, and could be guided by the principles of equity and the usages and customs of the country, except in so far as such action on their part would conflict with some substantial and expressly reserved right of the government.

Meaning of Cabida Legal.

Cabida legal simply means the amount or quantity of land which is absolutely protected against any attack by the Government to recover an additional price or to divest the title to the same by judicial proceeding on account of any excess in the grant. It does not mean any specific identified or located portion of the land within the perimeter of the grant.

Demasias are defined by article 3, chapter 1, of the Mexican law of 1894 "to be those *held* by private persons on primordial title and to a greater extent than specified, such surplus, however, being within the boundaries mentioned in the title, and consequently *mixed up in its entirety with the area for which a title is held.*

Mr. Orozco, an eminent Mexican legal authority of the present day, in discussing said law of 1894, says:

"We have already said that this overplus (demasias) consists of agrarian quantities which result within A WELL-IDENTIFIED PERIMETER between the area covered (protected against judicial proceedings to divest or to recover an additional price) by title, and the area which THE PERIMETER FIXED BY THE RESPECTIVE TITLES INCLOSES DE FACTO. Thus, for example, if the title concedes 1,000 hectares (2,471 acres) of land within fixed and determined monuments, and upon a new examination of it, it is demonstrated that within those monuments there is not 1,000, but 1,500 hectares (3,706

acres) this excess of 500 hectares (1,235 acres) is what is today called 'national overplus' (demasias nacionales)."

Counsel for the Government ask, "Why is this called 'national overplus' if private property?"

The answer is that it is an equitable right of action in the Government to recover an additional price for the entire tract of land contained within the perimeter of the grant, and in default of the payment by the grantee of that additional price to procure a judicial decree divesting the legal title of the grantee and reinvesting the legal title in the grantor in and to a certain portion of the land within the perimeter of the grant, and vesting in the grantee by a new title the fee and legal title to a specific part of said entire tract of land, according to a new survey of such specific part, and which specific part is to be selected from said entire tract, according to equitable principles, by the officer conducting said judicial procedure for the forfeiture of the remaining portion of the tract or according to the preference expressed by the grantee.

Before the decree of forfeiture is made and entered upon a proceeding which was instituted for that express purpose, in default of the recovery of an additional purchase price, the right of the owner extends "to every and to each part of the land surveyed," and *its owner has an equal right to every and to each part of all the land within the perimeter of the grant, just as we have seen he did under the ancient laws of Virginia.*

The interest of the grantee to the cabida legal is an undivided interest in the entire area of land contained within the perimeter of the grant under every possible conception of his rights which can be logically considered; and an undivided interest in a tract of land always attaches to every possible parcel of the land as well as to the whole thereof with equal effectiveness; and the owner of an undivided interest in a tract of land is seized of a legal title to the whole tract, and hence it is quite clear that the

grant was located within the meaning of the Gadsden treaty at the time of its original purchase by the grantee.

The government of Mexico never pretended that the initial point had any bearing upon the location of the cabida legal. This is clearly shown by the testimony of Mr. Bonillas, and the United States Government has offered no evidence to the contrary. To segregate the surplus under the Mexican laws was, in actual practice as well as in effect, to cancel the entire original grant and to locate by survey an entirely new grant somewhere within the perimeter of the original grant. The original grant was located at the time of its survey, and it extended to and included every inch of ground within its perimeter, and the new grant was located by a new survey prior to the issuance of the new title.

Whatever view may be taken of the rights of the government of Mexico with respect to this grant, it must be conceded that the title of the grantee was greater than that of a tenant in common under the English and American laws, for the grantee was certainly seized "*per my et per tout*," by the half or moiety and by all, and the grantee not only had the right to the possession of the whole as well as of every part, but until after a decree ascertaining the existence of an excess and declaring it forfeited, coupled with a survey segregating, and a conveyance or decree allotting a certain portion of the land to the grantee, *he had the exclusive right to the possession of the whole, even as against the Government.*

ARE ALL RULES OF EQUITY, GOOD MORALS, AND NATURAL JUSTICE TO BE TOTALLY ABANDONED AND IGNORED SIMPLY BECAUSE THE FORM OF THE JUDICIAL TRIBUNAL WHICH POSSESSED THE POWER TO HEAR AND DETERMINE SUITS TO REFORM PATENTS TO LAND IN MEXICO, OR ITS FORMS OF PROCEDURE, DIFFERED FROM THE CHARACTER, FORM, METHODS, AND PROCEDURE OF THE JUDICIAL TRIBUNAL CLOTHED WITH THAT AUTHORITY IN THE UNITED STATES UNDER OUR CONSTITUTION AND FORM OF GOVERNMENT?

The honor of the United States is at stake, and we do not think that this court, which is recognized as the highest and most powerful judicial tribunal on earth, is prepared to promulgate any such doctrine by its decisions in a proceeding in which the United States Government is not seeking to forfeit titles upon microscopical or unsubstantial or technical grounds, but in which it is simply endeavoring to perform the moral obligation which rests upon it under its solemn treaty with the government of Mexico and under international law, as well as upon sound principles of good morals and natural justice, to protect the ownership of private property belonging to its subjects acquired under the treaty, who now owe their allegiance to this Government, but whose property rights remain unchanged by the transfer of dominion over the country from Mexico to the United States.

In investigating these private rights of property, solely for the purpose of confirming and declaring the extent of the rights which existed in the owners thereof at the date of the Gadsden treaty (and not for the purpose, as is urged by counsel for the Government, of reforming titles to private property, and of thus declaring the extent of the rights which ought to have existed in the owners thereof, in the opinion of this court, at the date of said treaty), this court is directed by the act creating the Court of Private Land Claims (in strict accordance with international law) to be guided and controlled by the terms of the treaty and by the laws and ordinances of the government from which the title is alleged to have been derived and "ACCORDING TO THE LAW OF NATIONS."

It is conceded that the "law of nations" is rather an indefinite and uncertain field of knowledge; but, according to all writers on that subject, it is certainly supposed to be based (and it is not going too far to say that it certainly ought to be based) upon good morals and natural justice.

If this court has power to reform the title to this grant in

this proceeding, we must not lose sight of the fact that it is the Government of the United States which is seeking affirmative relief at the hands of the court, and that therefore it ought only to be allowed the affirmative relief sought by it upon clear and convincing proof that the government of Mexico suffered an injustice nearly a century ago, which ought to be righted at this late day, for the benefit of the United States as its successor in interest. In reaching this conclusion the court should be guided by the law of nations as well as by the laws of Mexico, and consequently it must proceed upon equitable principles and according to good morals and the principles of natural justice.

We submit that in this proceeding this court only has power and authority by a final decree:

First. "To settle and determine the question of the validity of the title;" and

Second. "To settle and determine the question of the boundaries," or, in other words, the location of the boundaries described in the title papers as the lawful boundaries of the grant.

But what are the lawful boundaries of the grant? In the case of Ainsa *vs.* U. S., 161 U. S., at page 211, this court, speaking through Justice Brewer, said:

"He (the surveyor) was directed to resurvey for Don Jose Elias and his parents the lands of Casita, giving them the area or number of sitios that legally belonged to them, with due separation of the sitio or sitios that resulted *in excess within the lawful boundaries of said lands of Casita.*"

The words in italics are quoted by this court from the survey of the demasias in that grant. It will be noticed that the Mexican officials referred to the "excess" as being "within the *lawful boundaries of said lands* of Casita."

It is obvious, therefore, that the Mexican officials con-

strued the natural boundaries described and set forth in the title papers of the grant as constituting its "lawful boundaries." And as this court said, in the case of Hornsby *vs.* U. S., 10 Wall., 224, "we cannot, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than that received from the Mexican authorities who were intrusted with their execution."

In the case of U. S. *vs.* Fremont, 17 Howard, —, the counsel for the Government of the United States urged in their brief that the grant ought not to be confirmed by this court, for the reason that the patent from the Government of the United States would convey to the grantee a valid title to the *minerals within the grant*, whereas under the laws of Mexico the *grantee had no such right.*

Counsel say:

"This land contains mines of gold and silver which by the Mexican law did not pass to the holder of the grant. Should you confirm this title, the grantee will obtain a patent which will pass to him the minerals to which by virtue of his original grant he is not entitled. Therefore do not confirm."

To this the court replied:

"We are acting under the statute of 1851. In it we find *no exception to mineral lands.* We are directed to investigate all titles that are laid before us, and confirm or reject them upon the principles laid down for our guidance in the statute itself. *Whether the confirmation and patent will vest a title to the minerals in the claimant is a matter with which we have nothing to do in this case, and which can only be the subject-matter of consideration* IN ANOTHER AND A DIFFERENT FORM OF ACTION."

We respectfully submit that the Court of Private Land Claims and this court have nothing to do with the question of reforming titles to land which had not been reformed by the government of Mexico prior to the treaty. That is a matter with which this court has nothing to do in this case

and " which can only be the subject-matter of consideration in another and a different form of action," to wit, in a suit brought by the Government of the United States for that express purpose.

Whether the confirmation and patent in this case will vest a title to any excess which may exist in the grant in the claimant is a matter with which this court has nothing to do in this case. The principle involved is identical. The minerals, like the excess, were mixed up in its entirety with the area for which a title is held.

My quotation from the brief of counsel for the Government in the Fremont case is taken from the case of Moore *vs.* Shaw, 17 Cal., at page 206.

The principle involved in this question seems to be covered by the general rule of law laid down by this court in the case of Pollard's Lessee *vs.* Hogan, 3 Howard, 219 and 225, as follows :

" Every nation acquiring property, by treaty or otherwise, must hold it subject to the constitution and laws of its own government and not according to those of the government ceding it."

In Mexico the title to the grant could only be reformed as to the excess, provided the treasurer general, who was the officer clothed with the judicial authority to hear and determine the question of the existence or non-existence of any excess within the grant, reported to the government (presumably the chief executive officer or governor of the State) that a " very great " excess existed, and provided further that said government considered that such excess was " *very great*," and that therefore the owner of the grant ought not to be allowed to retain the whole thereof or some less portion than the whole thereof (such amount to be determined by said government) by paying an additional price or sum of money to the government to wipe out the equity

existing in the government from the fact that quantity had been of the essence of the contract.

How can such a proceeding be now had in this country? Upon the report of what officer shall the Government determine whether the excess is "very great" or not? And what officer of this Government has been intrusted by law with the power to determine that question?

"The title passed *in presenti*, and the whole vested or none."

The reservation of the surplus is a defeasance, and it is void if the condition to give it effect has become impossible.

3 Pick., 272 (401?).

It can no more be reformed in this proceeding upon this ground than it could be forfeited upon proof that it had been abandoned by the grantee for a continuous period of one year prior to the treaty. Mexico never enforced the right and she might never have chosen to do so. This government is in the shoes of a mere subsequent grantee and she obtained title to no land which had previously been alienated by a completed title.

We know of no grant in Mexico in which it was held that the excess was "very great" in the opinion of the government, and while the law of the State of Sonora of 1852 might be persuasive in leading us to believe that if the excess exceeds one-third of the quantity called for in the title papers it shall be deemed "very excessive;" that law is certainly not controlling, for the reasons: First, that the State of Sonora had no control or jurisdiction over the public lands within its borders in 1852, because that power, control, and jurisdiction vested in the government of Mexico at that time; and, second, because it was a mere declaration of a rule to guide the conscience of the government of Mexico in reforming the titles of the owners of land, and that rule was never put into force or effect as to this grant prior to the Gadsden treaty; and, thirdly, it is not equitable, it is not good morals,

it is not natural justice, and it does not express the true conscience of Mexico upon this subject, as she has declared it in every other legislative enactment on the subject, including the law of 1863 and the law of 1894. And we have seen that even these far more equitable laws "alarmed" owners in Mexico and were denounced by them as *mere* acts of confiscation. The law of Sonora of 1852 is a mere act of confiscation in so far as it directs the sale of the demasias at auction, and, like the decrees of Santa Ana declaring all grants void and to which this court was asked to give that effect in the Ely case, this law has no effect upon our rights, because no action was ever taken under it by Sonora or Mexico to divest our title prior to the Gadsden treaty, and the divestiture of a title not legally vested can only be consummated by a judicial finding and decree.

RULES OF CIVIL LAW AND OF COMMON LAW ARE IDENTICAL.

The rule of the civil law as applied in Mexico, not only between individuals, but as between the government and its grantees, in determining whether a grant is one by specific boundaries or by quantity, is identical with the rule under the modified form of the civil law which exists in Louisiana, and is identical with the rule of the common law in this respect.

The only distinction which ever existed in Spain or Mexico in this regard between a conveyance from one individual to another and a conveyance from the government to an individual, is that in the first class of cases no right existed in the seller to secure a rescission of the conveyance when quantity was of the essence of the contract, provided the seller was willing to pay the additional price which might be ascertained to be due upon equitable principles by a judicial decree; whereas, in the second class of cases, the government reserved the option of reforming the

title, even when the purchaser was willing to pay any additional price which might be ascertained to be due, except in so far as this option or right was modified or waived by the cedula of 1754 and the law of the State of Sonora of May 12, 1835; but in exercising this right the government of Mexico has always proceeded upon equitable principles, as we shall presently show, and all of her legislative enactments have been based upon the well-established principles of equity as applied to conveyances between individuals, *except in so far as those principles have been modified by the financial exigencies of the government.*

Turning first to the proposition that the rule is the same in Spain, Mexico, Louisiana, England, and the United States in regard to whether a grant shall be construed as one by specific boundaries or by quantity, we find that the reason given by the common-law judges for allowing natural landmarks and artificial monuments to control courses and distances in determining what land was conveyed by the deed or grant, and to allow courses and distances to prevail over quantity, is identical.

In the case of McIver's Lessee *vs.* Walker, 9 Cranch, 178, Chief Justice Marshall, speaking for this court, said:

"All lands are *supposed* to be 'ACTUALLY SURVEYED,' and the INTENTION OF THE GRANT is to convey the land ACCORDING TO THAT ACTUAL SURVEY. Consequently if marked trees and marked corners be found conformably to the calls of the patent, or if water-courses be called for in the patent, or mountains or any other natural objects, distances must be lengthened or shortened and courses varied so as to conform to those objects. It is a general principle that the course and distance must yield to natural objects called for in the patent."

"The REASON of the rule is that it is THE INTENTION OF THE GRANT to convey the land ACTUALLY SURVEYED, and mistakes in courses or distances are MORE PROBABLE and MORE FREQUENT than in marked trees, mountains, rivers, or other natural objects capable of being clearly designated and accurately described."

IN LOUISIANA, WHERE A MODIFICATION OF THE CIVIL LAW AND OF THE CODE NAPOLEON HAS BEEN ADOPTED BY STATUTE, *the rule is identical with that of the common law.*

In State *vs.* Buck & Fruit Co., 46 La. An., 670, the court says:

"A sale in which specific boundaries are given is a sale PER AVERSIONEM or a sale from ONE FIXED BOUNDARY TO ANOTHER, which INCLUDES ALL THE GROUND BETWEEN THE BOUNDARIES MENTIONED, WHETHER THE MEASURE BE CORRECTLY STATED OR NOT, THE CALLS FOR BOUNDARY CONTROLLING THE ENUMERATION OF QUANTITY."

Citing Harman's Heirs *vs.* O'Moran, 18 La., 526; Prejean *vs.* Giroir *et al.*, 19 La., 422; Hoover, tutor, *vs.* Richards, 1 Robinson, 34; Saulet *vs.* Trepagnier, 2 Robinson, 357; Labichie *vs.* Jahan, 9 Robinson, 30.

In Boyce *vs.* Cage, 7 An., 672 (La.), the court said:

"To constitute a sale *per adversionem*, (*i. e.* by specific boundaries) there must be either a distinct or separate object described, such as the Manor of Dale, an island, an inclosed field. A sale is also considered PER AVERSIONEM when it is FOR A TOTAL SUM, and ASSIGNS TO THE LAND SOLD EXISTING VISIBLE BOUNDARIES, such as rivers, highways, fences, pieces of stone, iron, or wood, showing the starting point and direction of the dividing line with the adjoining tenements. These last sales are held to be PER AVERSIONEM on the PRESUMPTION THAT THE PARTIES TO THEM HAVE THEIR ATTENTION FIXED RATHER UPON THE BOUNDARIES THAN THE ENUMERATION OF A QUANTITY."

Citing Fiske *vs.* Fleming, Syndic.

THIS RULE HAS BEEN UNIVERSALLY FOLLOWED BY THE SUPREME COURT OF LOUISIANA.

The case of Hoover, tutor, *vs.* Richards and Wife, 1 Robinson, 34, is neither a modification of nor an exception to the rule. It is plainly distinguishable, because in that case fixed boundaries were only given as to three sides of the tract of land sold, and the fourth side was left open and

undetermined by any fixed specific landmark, monument, or boundary, but, on the contrary, this fourth side was only determinable by the statement that the land had "a front on the river of about eight arpents, with a depth of forty, SO AS TO INCLUDE THE AFORESAID QUANTITY of 320 superficial arpents."

The land was described as situated "On the west margin of the Mississippi river, bounded on the upper side by the land of Samuel Phipps and on the lower by land of John Sandal, having a front on the river of about eight arpents, with a depth of forty, SO AS TO INCLUDE THE AFORESAID QUANTITY of 320 superficial arpents," et cetera. The court said:

"The last expression, viz., SO AS TO INCLUDE THE AFORESAID QUANTITY OF 320 SUPERFICIAL ARPENTS would seem to control the previous one setting out the adjacent proprietors and limiting the grant and superficies to 320 arpents situated between those two tracts, and having a front on the river, extending from the land of Phipps to the land of Sandal with the fourth side moving on a sliding scale so as to secure the QUANTITY of 320 superficial arpents."

The REASON for this decision was that NO PRESUMPTION COULD BE INDULGED that the minds of the parties met upon a fixed point or boundary for the fourth side, as there was no specific object or fixed place described on that side to attract, fix, or arrest their attention, and this is the FUNDAMENTAL REASON for the rule that specific boundaries shall prevail over courses and distances, and courses and distances over quantity, as we have seen.

It is apparent that the supreme court of Louisiana does not consider that the case of Hoover, tutor, *vs.* Richards and Wife is an exception or modification of the rule in regard to specific boundaries prevailing over courses and distances and over quantity, because it is cited in support of that rule in its latest decision that we have had time to find upon the

subject, State *vs.* Buck and Fruit Co., cited *supra*, and decided in 1894.

The case of Hoover, tutor, *vs.* Richards and Wife is paralleled by the decision of this court in the case of U. S. *vs.* Fossat, 20 Howard, 413, which involved the location and extent of a Mexican land grant in California, and in which the facts were identical with those in Boyce *vs.* Cage, to wit, the quantity was given and the southern, western, and eastern boundaries of the grant were designated by fixed natural landmarks. This court held that it must be construed as a grant by quantity, with the southern, western, and eastern boundaries as designated in the title papers, and by using a sliding scale, in order to fix the quantity named within said boundaries, in determining the length of the side lines from north to south.

The case of Phelps *vs.* Wilson, 16 La., 185, is no modification of or exception to the rule. The court held therein that the sale of a body of land as a section, which has limits *mathematically* fixed and established, and generally known, is not a sale *per aversionem* (by specific boundaries); but there the sale was of a certain number of acres described only according to survey lines which had been *mathematically* fixed, but which the court held, AS A MATTER OF FACT, were ONLY IMAGINARY LINES UPON THE EARTH'S SURFACE and DID NOT CONSTITUTE ANY FIXED OR PERMANENT OBJECT which it might be PRESUMED THE PARTIES FIXED UPON rather than upon the question of quantity.

The laws of Spain and Mexico at the date of the sale, to wit, 1821, when the proceedings were initiated, and January, 1822, when the sale was completed by the payment of the purchase price, and 1825, when the conveyance was consummated by the execution and issuance of the title papers, *did not authorize a sale of a floating or unlocated quantity* of land, but expressly *limited the power* of the granting officer to the making of *a sale based upon a prior survey of the land*

sold; and hence, if the proceedings showed upon the face of the title paper that the sale was *intended* to be one of an unlocated and unsurveyed quantity of land to be afterwards selected by either the government or the purchaser within designated outboundaries, it would be VOID for want of power in the officer to make such a sale.

Logically, counsel for the Government are right, and the legal title to the entire tract vested in the grantees, or else the grant was unlocated at date of Gadsden treaty, and hence, if the Spanish version of the treaty contains the requirement that the grant must have been located (which it does not, however), all these Arizona grants are of the kind that the treaty expressly refuses on the part of the United States to recognize as valid.

Effect of this rule would be to avoid every grant ever made in the State of Sonora had we acquired that State under the Gadsden treaty. It puts the Mexican government in the position of having failed to protect its citizens in their undoubted rights of property, and puts this Government in the position of intending to confiscate all private property when it entered into the treaty. A rule which would bring about such disastrous and alarming results, and one so contrary to natural justice, will not be readily adopted.

Surely, where a grant is made by metes and bounds, and according to a survey previously made, for the purpose, as Justice Fuller has said in the Ainsa case, "to delineate a tract containing the desired number of sitios" * * * "that is the land to come to him (the grantee)"—the intent of the parties is to convey the fee to that specific tract of land, and not to an unlocated and unspecified quantity only.

Surely, such a conveyance cannot be the exact equivalent of a "floating grant" such as is described by Justice Field in the case of Hornsby, *et al. vs.* U. S., 10 Wallace, 224, for such a grant was merely equivalent to a land warrant, which entitles the holder to have that quantity of land afterwards located and vested in him at some point within specified outboundaries, which may include the entire United States or a certain territory or a certain portion of a certain territory or territories. For in such a floating grant, title is not

vested in the grantee to any specific tract of land, and he is not entitled to the possession of any specific tract of land as against the world, until after the specified tract is located in accordance with law and he is put in juridical possession of the same.

Mallern *vs.* U. S., 1 Wallace, 282.
U. S. *vs.* Pico, 5 Wallace, 536.

In such a grant the survey and delivery of possession vest the fee to that specific tract in the grantee, says Justice Field, and the delivery of possession is a judicial determination that the grantee is entitled to that specific tract, and the fee thus vested cannot be divested, except by a judicial proceeding. As this court said in the recent case of Camou *vs.* U. S. "The divestiture of titles once legally vested is a judicial act."

But this does not involve the idea that if there was a mistake or fraud in such a survey, the Government would have no right to reform the title in a judicial proceeding for that purpose. It has often been determined by this court that the Government is in the same position as an individual in that respect and is subject to the same rules of proof as to the mistake or fraud, but it is only when the mistake is so gross as to be equivalent to fraud, and when the action on the part of the Government is promptly taken, that a title can be reformed merely on the ground of excess, under our system of laws; and in the case of Hancock *vs.* U. S., Justice Brewer writing the opinion, this court held that fifteen years' laches precluded the Government from raising the question.

In the one case, the grant issued before the survey, and the survey was necessary in order to vest the title of the grantee in any particular land; in the other case, the law required the survey to precede the grant, in order to specify and identify the land which it was intended to convey to the grantee, and it obviously follows that if the prior survey was omitted by mistake or fraud, and if this fact appeared

on the face of the title papers in the case at bar, the sale would be not merely voidable but absolutely *void for want of power in the officer* (under the laws of Spain and Mexico, which were then applicable within the limits of Sonora) to make a sale of an unlocated quantity of land.

How can it be said that the effect of the survey and delivery of possession was any different or any less efficacious in the case where the law expressly required the survey to precede the grant than in the case where the law or the conveyance expressly required the survey to succeed the grant?

If the survey and delivery of possession vested the title to that specific tract of land in the one case, it would seem irresistibly to follow that it did the same in the other.

What was the purpose of the survey, and of the notice to contiguous owners to be present, if it was not the intention of the Mexican government to convey the specific tract of land which was being surveyed?

What land, and what sitios were appraised?

Was it the duty of the appraisers to remeasure the land, and thus make sure of the number of sitios? Or was it their duty to inspect the land which had been measured and surveyed, and to appraise that particular land, accepting the statement of the surveyor as to the quantity or number of sitios contained therein?

If the petitioner asked for *four* sitios *and the survey actually included only three sitios*, but the surveyor stated it included four, and the public crier declared he was about to sell four sitios, *to what four sitios would title vest in the grantee by such a sale?* On which side of his grant would this Government give him the additional sitio at this time? Did the laws of Spain and Mexico give him an absolute right to the additional sitio or would it have been a matter of grace? Could he have recovered a portion of the purchase price if he had bid greatly in excess of the prevailing market price of four sitios of the best land? If not, is it not unequal and unjust, as Chief Justice Marshall said, to forfeit any part of his land if he paid a just price for the whole?

Surely, the title to some land vested in the grantee by

such a formal conveyance after such a careful survey and the erection of monuments and the placing of him in possession with a penalty under the law if he did not erect and maintain certain kinds of monuments at the points designated by the surveyor as the limits and boundaries of his land.

Counsel for the Government insist THAT IN MAKING THIS GRANT IT WAS THE *intent* OF THE GOVERNMENT OF MEXICO TO CONVEY ONLY AN UNLOCATED QUANTITY OF LAND WITHIN CERTAIN EXTERIOR BOUNDARIES, but we have seen that the granting officer had no power or authority to make such a sale, and it is not creditable to the government of Mexico to indulge in any such presumption, because to do so is to charge the government of Mexico with having made the formal survey and the appraisement of the lands so surveyed, and with having delivered to the intending purchaser the possession of the tract of land so surveyed *for the sole purpose of deluding and deceiving him into the honest belief* that in bidding for the land at the public auction sale he was buying a specified, located tract of land which he had examined and which he knew the value of, and of thus fraudulently *inducing him to pay a much larger price for the land than the quantity of unlocated land being actually sold by the government was worth.*

Ramon Romero was present at the survey of the land and he signed as a witness for the appraisement of the land, and also as a witness to the thirty auction sales of the land which were held at Santa Cruz. Bustillo, the petitioner, was likewise present at the survey and at the appraisement and the proper officer placed him in possession of the tract of land as surveyed, and it is difficult to understand how any one can reach the conclusion that either of these parties did not believe that he was bidding for all the land included in the survey.

MISTAKES IN SURVEYS.

It is no answer to say that the survey was so excessive as to the quantity of land included within it that Romero must be presumed to have had knowledge of its fraudulent character, for the following reasons, to wit:

(*a.*) The condition of Sonora was only semi-civilized at that time. Its population was sparse and was mostly composed of illiterate Christianized Indians and of a simply ignorant offspring from their marriages with an inferior class of Spaniards. Sonora was in a constant state of revolution during practically all the time from the date of Mexican independence down to the date of the Gadsden treaty. Its records of land titles were crudely kept and sometimes destroyed. Land was of little value, and the unit of measurement in making grants was 4,338½ acres. The ruling price for dry land was the sum of ten dollars, or, in other words, the large amount of forty dollars for a cattle ranch of four sitios, which was the maximum amount that could be sold to a wealthy person. The paramount consideration exacted by the government was that the lands should be occupied, and there was probably not a competent surveyor in the entire country.

(*b.*) The record shows that these mistakes in surveys were almost universal. (See testimony of Ygnacio Bonillas, Rec., pp. 96, 97, 135, 138, 224, and 225, and Pl'ff's Ex. F 60, at pp. 444, 445, and 446.) Bonillas testifies that in making over one hundred resurveys of grants in Sonora, as a government official, he had occasion to verify more than one thousand courses and distances, and that in only five or six instances did he find either the course or the distance correct, and that in no one instance did he find both the course and the distance correct, and that in only two of these hundred grants did he find that the quantity actually contained

within the perimeter of the grant was less than that called for in the title papers, and that in all the other ninety-nine grants he found the quantity contained within the boundaries was much greater than the quantity called for in the title papers, and that from his observations in making surveys he found that up the valley or stream was called "North" if it pointed anywhere within ninety degrees of north on either side, and that the directions at right angles thereto were called "East" and "West" respectively, and that the surveyor often stated that he ran a certain number of cordels toward the north or some other direction, whereas he actually ran not more than one-tenth or less of the distance stated, and that the surveyor stated that he ran the same distance in the opposite direction, whereas he actually ran five or ten times the distance stated. At page — of the record he gives a striking illustration of this fact, and refers to a grant with which Special Agent Henry O. Flipper, who was then present in court aiding the counsel for the Government, as is shown by the record, must have been familiar.

Speaking of a grant, this court, in Billings *vs.* U. S., 2 Wall., 449, said:

"Perhaps the province of California at that time could not furnish a man capable of making an *actual* survey."

If we are to believe the recitals in the expediente of this grant, the surveying party, measuring with a cord only fifty varas long, *actually* chained the first day six miles from the center toward each cardinal point, returning to the center each time for a fresh start. This would make forty-eight miles, and they had come from the town of Santa Cruz, which is twelve miles south of the center, making sixty miles; and if they returned to Santa Cruz it made a total of seventy-two miles traveled by them that day. *It is highly improbable, if not impossible, that this was done.* The fact probably is that they actually went to the places at which they state they actually erected monuments, but *in no case*

did they actually measure the distance. They generally knew the land which the petitioner wanted, and they always asked him where he wanted it, and whenever he asked them not to go any farther in a certain direction because the land was better in the opposite direction, they followed his request and gave him the additional distance in that opposite direction as they estimated it. This was a recognized custom with the full force of positive law.

It is significant that Special Agent Flipper, who testifies in the case of Faxon *vs.* United States, which was heretofore before this court, that he had an extensive experience in resurveying grants in Sonora, and that he had examined the titles to over two thousand grants in Chihuahua, was not put upon the stand as a witness by the Government to contradict or modify any statement made by Mr. Bonillas.

At page 227 Bonillas testifies that he does not know of a single instance where the owner was not allowed to retain the entire grant—that is, to retain all the excess—if he desired to do so.

In his testimony, at pages 117 and 118 of the record, Mr. Ygnacio Bonillas states that he resurveyed the Santa Barbara grant, which contained about twelve square leagues, including the excess, and that the owners were allowed to retain the excess "at very low rates, not above two cents, probably two and a half cents per acre on account of the long-time possession under the grant," although they had lost their title papers, and the only way in which the boundaries of the grant could be determined was from the fact that in one of the deeds made by one of the successors in interest of the original grantee he described the grant as extending from certain boundaries on the south to certain boundaries on the north, and from a range of mountains on the east to a range of mountains on the west.

The Alamo de Sevilla grant is located just east of the presidio of Santa Cruz, in Sonora, and it was resurveyed in 1885 or 1886 by Mr. Ygnacio Bonillas. The title paper

calls for four sitios of land, and in making the original survey the Mexican surveyor had run 200 cordels, or two leagues, from the center toward each cardinal point, giving the grant a total area of sixteen sitios, as in this grant.

At page 97 of the record Mr. Bonillas testifies that in resurveying the Alamo de Sevilla grant he found he could not go to the south center monument described in the title papers, because it would take him into other private property, and so he surveyed the grant in that direction to the limit of these private properties, and that he did not find the east and west center monuments, and so he gave the grant simply the 200 cordels which the title called for, and that he found within these boundaries an area of $23\frac{1}{2}$ leagues, or 102,355 acres. As the total area called for in the title papers was four sitios, or 17,354 acres, that would leave an excess of 85,001 acres. The Mexican government permitted the owner of this grant to retain this entire quantity.

(c.) In an official letter, written by Jose Maria Mendoza, the treasurer general of the then department of Sonora, to the Secretary of State and of the Department of the Treasury of the Republic of Mexico, on February 23, 1839, he says:

"MOST EXCELLENT SIR: One of the sources of public revenue in this department is that from the composition and grant of lands for breeding cattle and horses and is that which, from the time of the extinguished intendencies of the Spanish government up to the present, has been and continues to be, extremely enormous and laborious, because of the innumerable registries made by breeders of the immense tracts of public lands which this department has; because of the large number of grantors who appropriate CONSIDERABLE EXCESSES OF SITIOS which are wanted by breeders who need them and DEFENDED BY THOSE WHO ARE IN POSSESSION OF THEM, *and said excesses arising from the fact that ancient surveyors, from ignorance or bad faith, to measure two sitios, measured four, and to measure that number measured eight or more sitios, etc.*, and finally, because of the many

tracts of land that are surveyed and lawfully held, but without the grant title, because of the failure or delay of the holders of the same, and because of the inculpability of others WHOM AN INVINCIBLE IGNORANCE or just and reasonable causes have prevented from acquiring such documents for their protection, BUT AGAINST WHOM THOSE LANDS HAVE BEEN DENOUNCED BY INTERESTED PARTIES WHO BELIEVE THE FORMER HAVE LOST THEIR RIGHT, wherefore it may be asserted that said bureau for the composition and grant of lands in Sonora has always absorbed and continues to absorb almost the entire attention, to state it in that way, of the chiefs and employés of the treasury, under whose charge it has been and is at present, and it has also occupied probably the greater part of the labors and mechanism of its offices, as is clearly apparent from the multitude of finished expedientes of lands that exist therein; from those the proceedings in which are pending and from those that are instituted anew more and more every day. * * * In consequence the honorable congress of the old State, during the federal régime, notwithstanding the existing laws on lands, saw itself under the necessity of afterward enacting other laws and decrees relating thereto, numbers 10, 26, 21, 62 and 75 of May 30 (Reynolds, 184) and July 11, 1834 (Reynolds, 186) May 12, June 13, and July 17, 1835, besides regulations by the executive of said State of February 28 of the second of said years (that is, of the year 1835)," et cetera.

The foregoing letter shows that the law of the State of Sonora of May 12, 1835, was passed for the purpose of confirming and quieting title in the possessors to all grants in which an excess existed; and we shall presently attempt to show by authority that it conveyed a vested right in the excess to the grantee and was irrepealable for that reason; or, rather, that it was an absolute waiver by the Mexican government of its option to reform the title by a judicial proceeding instead of demanding an additional price merely.

(*d.*) On October 22, 1791, Pedro de Nava, a Spanish officer holding a high position at Chihuahua, a neighboring State to Sonora, issued an order saying that " In accordance with

the opinion of the assessor of this commandency general, I have resolved by decree of today that * * * considering sufficient for the new settlements that are being formed under their protection, *the boundary of four common leagues, measured from the center of the plaza of the presidio, two to each wind*, I have also determined, in order to avoid doubts and appeals in the future, that the captains limit themselves hereafter in the concession of grants of lots and lands *to those that shall be included in said four leagues*, without their being increased in any manner, leaving free and operative the exclusive jurisdiction that belongs to the intendentes of the royal treasury for the sale, composition and apportionment of the other lands in their respective districts."

There can be no doubt about the fact that at the time of said order each presidio was entitled to only four common leagues or, in other words, to only four sitios of land, and yet there can be no doubt about what Pedro de Nava intended when he directed and ordered that in measuring "said four leagues" the surveyor should commence at the center of the plaza of the presidio and should measure "two (leagues) toward each wind," because the universal rule for the measurement of a sitio, both in Spain and Mexico, from time immemorial had been and still is to commence at a central point and to measure one-half a league, or fifty cordels, toward each of the cardinal points of the compass, returning to the center and taking a fresh start for each of such measurements. Practically every grant in Mexico was measured in this way, and the rule is laid down as an unqualified one in both Galvan and Eschriche for the proper measurement of a sitio. Moreover, the language is plain and unmistakable in this order, as Pedro de Nava directs that the survey shall be "*measured from the center of the plaza of the presidio*," and he certainly intended that the plaza should remain as the center of the presidio, as was the universal custom in Mexico, and I defy counsel for the Government to suggest any possible way in which a person can

"START" at a "CENTRAL" point and measure two leagues toward any wind and continue the survey so as to make a square of any number of sitios of which that STARTING point shall be the CENTER. It can only be done by returning to the center each time and making a fresh start "toward each wind." Moreover, this expression was a universal one in Spain and Mexico, and its meaning is unequivocal. It means the same thing the world over. "Toward a wind" means in the direction from which that wind is coming. We speak of a north wind and of a south wind, and of an east wind and of a west wind, and of a southwest trade wind and of a southeast trade wind, and no one ever doubts the meaning of the language.

Moreover, the "common" lands of the presidio of Santa Cruz contained about the same quantity of land as this grant, although the law limited them to four sitios, and in the survey of them the same mistake was doubtless made, and the residents of Santa Cruz believed that was the way to measure four sitios. The northeast corner, north center, and northwest corner monuments of the presidio were connected with the southeast corner, south center, and southwest corners of this grant. (See sketch, record.)

It cannot be presumed, under these circumstances, that Romero or any other of the purchasers had any knowledge that the grant contained more than four sitios of land.

Moreover, the promotor fiscal or attorney general of Sonora approved the proceedings of the survey of this grant in January, 1822, and the officers composing the superior board of the treasury likewise approved it at that time, and Riesgo, the commissario general, approved it and directed title to issue in May, 1825, and the treasurer general, who was the judicial officer possessing power to reform titles to lands, again approved it in 1831 by writing to Romero requesting him to pay ($50) fifty dollars additional fees therefor and to take out of the treasury the title papers in this

grant which had been entrusted to him for delivery by said commissario general.

It is axiomatic that every officer is presumed to have performed his duty until the contrary is shown.

"*All favorable presumptions will be made against the forfeiture of a grant.*"

Gonzales *vs.* Ross, 120 U. S., 616.

The testimony of Mr. Bonillas, at page 129 of the record, is instructive as showing how little we can be guided by the acts of the Mexican officials in determining what equitable rules should be applied by this court in settling the titles to Mexican grants. Mr. Bonillas testified, as is there shown, that the residents of Santa Cruz had a good many lawsuits with outside parties over the boundaries of the presidio, and that finally the residents of Santa Cruz got together and decided that if they did not have the town lands properly allotted among the different heirs of the families in the town, that they would probably lose them all (through denouncements of land being made by outside parties under which the surveys included portions of the presidio of Santa Cruz because no representative of the town attended at the time of the survey and protested against the surveyor encroaching upon the presidio lands by running his lines within their boundaries), and they therefore sent a commission and begged the governor to interfere in settling their titles to the presidio lands, and *the governor advised them to make a survey of what lands they had left*, and they did have such survey made and secured a new title to that portion of their lands.

At page 228 of the record, Mr. Bonillas testifies that he now holds title himself to that part of this grant which lies in Mexico, about two sitios, and in answer to Mr. Pope, one of the counsel for the Government, he testified as follows:

"Q. Did you deraign your title from the Government?

"A. Yes, sir. I would like to explain if you will allow

me. I think there was an application made for a survey of the Encinitos. The publications were made summoning the owners and those that might have any claim to these lands to appear and show why no such survey should be made. Nobody appeared; nobody claimed the land; consequently the Government, believing that it was its own land, issued title to it.

"Redirect examination by Mr. HENEY:

"Q. You can denounce any private lands in the State of Sonora and the Government will issue title to you?
"A. Yes, sir.

"Recross-examination by Mr. POPE:

"Q. Do you have to petition for the land that you own?
"A. All the proceedings are gone through. If you do not appear to show why title to the land should not be sold, why, it is sold, and title issued upon demand of a third party."

And counsel for the Government say that this is evidence of the fact that the Mexican government was not bound as a matter of law—*that is, as a matter of good morals, natural justice, and sound equity*, and not, as a matter of grace—to recognize our title to any particular part of this grant or to any more than four sitios thereof, and that the United States ought not to recognize our title to even the paltry amount of four sitios, *because no particular four sitios in the grant were ever designated as ours*, ALTHOUGH IT HAS NOT BEEN SHOWN THAT AT THE DATE OF THE TREATY ANY EXCESS WAS KNOWN TO ANY PERSON TO EXIST WITHIN THE GRANT.

Alfred A. Green made application to the judge of the first instance, at Magdalena, to have this grant decreed to him according to the title papers, in the year 1880, and, after a trial, the judge of the first instance gave directions to the district judge, at Guaymas, to issue a decree or decision that he was entitled to all the lands to the outside boundaries. Magdalena is in the district within which that part of this

grant lies which extends into Mexico (Rec., pp. 227, 228). Are counsel for the Government willing to accept this fact as conclusive proof of our rights to the entire tract? It is a poor rule that does not work both ways.

The privilege which is accorded to other Mexican citizens of denouncing the surplus or demasias does not operate to divest the title of the grantee to the excess, any more than does the same privilege which is extended to Mexican citizens to denounce the entire tract, if it is abandoned by the grantee or his successors in interest for a continuous period of one year. The grantee may abandon the land for fifty years, and the legal title will continue in the grantee until it is divested by a judicial proceeding, instituted for that express purpose, either by some private person who denounces the land (that is, who petitions for the privilege of purchasing the same at public auction after a hearing and determination in a judicial proceeding that it has been abandoned) or by the Government; or unless he is by a judicial proceeding for some other purpose which operates, as a bar to his rights by reason of its being an action *in rem.*

And this was the law in Mexico, no less than in the United States and England, notwithstanding the fact that the political arm of the government in Mexico retained the power to hear and determine these questions, before a land officer who was clothed by law with this judicial power.

White *vs.* Burnley, 20 How., 235.
Taylor *vs.* Brown, 5 Cranch, 234.
Mitchell *vs.* Smale, 140 U. S., 374.
Sturgeon *vs.* Floyd, 3 Richardson (S. C.), 90.

A patent divests the title of the United States from each and every part of the land described therein, and the Government has the same rights as an individual to sue to set it aside; but it has no other or greater rights than an individual, and it is bound to establish the mistake of its

officer, or the fraud of the grantee, by clear and convincing evidence.

U. S. *vs.* Hughes, 11 Howard, 568.

U. S. *vs.* Maxwell Land Grant Co., 121 U. S., 949.

IN OTHER WORDS, IN MEXICO THE GRANT WAS VOIDABLE BUT NOT VOID AS TO THE EXCESS; AND HENCE THE LEGAL TITLE AND FEE TO THE ENTIRE AREA WITHIN THE PERIMETER OF THE GRANT PASSED OUT OF THE GRANTOR AND VESTED IN THE GRANTEE AT THE TIME OF THE SALE.

An excess of quantity in the grant does not affect its validity, regularity, or completeness. It is a perfect grant if the title was lawfully issued, or if the issuance of the title was afterwards ratified or confirmed, even if the grant contains an excess of quantity; and there only remains in the sovereign a mere right of action to recover an additional purchase price upon principles of equity, or to reform the title upon the ground of mistake in its own officer or of fraud in the grantee.

"*The patent is the highest evidence of title, and is conclusive as against the Government and all claiming under junior patent or title until it is set aside by some judicial tribunal.*"

THE COURT OF PRIVATE LAND CLAIMS IS COMPOSED OF FIVE JUDGES WHO WERE APPOINTED IN 1891, AND WHO HAVE BEEN CONSTANTLY ENGAGED EVER SINCE THAT TIME IN STUDYING THE QUESTIONS OF LAW INVOLVED IN THE DETERMINATION OF THE VALIDITY OR INVALIDITY OF THE TITLES TO MEXICAN GRANTS, TO THE EXCLUSION OF EVERY OTHER DOMAIN OF THE LAW.

The first decision made by those judges was that the Nogales grant was void, because not located, or that in any event the grantee was only entitled to the quantity of land called for in the title papers, and that he had already received that quantity.

In the Ely case, which was one of the next decided by

that court, it held that the grant was void for *want of power* in the officer to make it, but subsequently it became convinced that its decision upon that point was wrong, and in the next case of the kind that came before it a contrary decision was rendered.

Before this court had rendered its decision in the case of Ely *vs.* U. S., holding that the officer who made the grant had power to do so, but that it was equitable, under the facts in that case, for this Government to confirm the grant only for the quantity specified in the title papers, the Court of Private Land Claims tried and decided the case of Maish *vs.* U. S., involving the title to the Canoa grant in Arizona, and held that it was a grant by specific boundaries and that it vested in the grantee a valid and perfect title to all the land contained within the boundaries described in the title papers. That grant was made under a similar system of laws to the one involved in the Ely case, and the facts in relation to the price paid were similar, and this court reversed the case and held that it was equitable for this Government to confirm the grant only for the quantity mentioned in the title papers. The decision was made upon the authority of the case of Ely *vs.* U. S.

In the case at bar the Court of Private Land Claims held that this case is not different in its essential features from the case of Ely *vs.* U. S., reported in 171 U. S., and that, therefore, the decision in that case is conclusive as to the regularity of the proceedings and the validity of the claim in this case, and that this case is not distinguishable from the cases of Ely *vs.* U. S., and of Cameron *vs.* U. S., and of Perrin *vs.* U. S., and of Maish *vs.* U. S., which were all decided by this court at the same time, and are reported in 171 U. S., and that, therefore, this grant could only be confirmed for the quantity mentioned in the title papers.

The trial court gave no consideration to the fact that the grant shows upon the face of the title papers that the surveyor measured sixteen sitios instead of four, and that the price paid

by the grantee in this case exceeded the minimum price at which the government was willing to sell sixteen sitios of the best quality of land at that time, and that the number of purchasers exceeded one person for every four sitios of land contained within the grant, and that the price paid by the grantee exceeded the prevailing market price of the entire quantity and quality of land which was contained within the natural boundaries described in the grant.

THE TRIAL COURT FOUND AS A MATTER OF FACT THAT THE BOUNDARIES OF THE GRANT ARE AT THE PLACES FIXED IN THE MAP OR PLAT OF THE SURVEY OF THE GRANT WHICH WAS MADE BY MR. YGNACIO BONILLAS IN THE YEAR 1895, because—

In paragraph IV of the decree of that court it holds that "the petition herein and the answers of defendants Colin Campbell and Harvey L. Christie were sustained by legal and satisfactory proofs," etc., and the plat of the survey of this grant by Bonillas is a material part of said petitions and answers.

The court further held that this "grant was complete and perfect at the date of the treaty and the statute creates no limitation as to the time within which an action for the confirmation of such a grant must be brought."

The decision by the Court of Private Land Claims sustaining the grant was made by Chief Justice Reed and Justices Stone and Sluss, and these are the same three judges who held in the Maish case that the Canoa grant was one by specific boundaries, and that it conveyed to the grantee a valid title to all the lands within its boundaries.

In the recent case of The Arrivaca Land and Cattle Co., appellant, *vs.* U. S., now pending on appeal in this court, being case No. 153 of the October term, 1901, Justice Sluss filed a dissenting opinion upon the trial of the case in the lower court, in which he discusses in a masterly way the question of the location of a grant and of the effect of a sur-

vey thereof prior to the sale and according to which survey the grant was made.

The reasoning of Justice Sluss is so convincing and is, to my mind, so unanswerable that it leaves nothing more to be added upon this subject. That part of the opinion of the learned justice which bears upon the questions involved in this case is quoted in full in the brief and argument of Mr. Rochester Ford, of counsel for Colin Cameron in this case, at pages 28, 29, 30, 31, and 32 thereof.

It is true that Justice Sluss concludes by holding in that case that the grant ought to be confirmed for only two sitios of land, although a greater quantity is contained within its boundaries, but *it is apparent from the reasoning of the opinion that he reaches this conclusion only because he considers that the decision of this court in the Ely case and in the Maish case is conclusive upon the Court of Private Land Claims in the determination of the validity or invalidity of all similar grants.*

THIS CASE DISTINGUISHABLE FROM ELY CASE.

WE RESPECTFULLY SUBMIT THAT THE CASE AT BAR IS PLAINLY DISTINGUISHABLE FROM THE ELY CASE AND THE MAISH CASE, because—

IF THE GRANT IS LIMITED TO SIXTEEN SITIOS, BEING THE AMOUNT WHICH IT IS SHOWN ON THE FACE OF THE TITLE PAPERS TO CONTAIN, THERE CAN BE NO SHADOW OF REASON UPON WHICH IT CAN BE MAINTAINED THAT THE GOVERNMENT OF MEXICO HAD ANY MORAL OR EQUITABLE RIGHT TO RECOVER ANY SURPLUS LAND OR ANY ADDITIONAL PRICE, because,

(*a.*) The total price paid amounts to seventy-five dollars per sitio for sixteen sitios, and the minimum price for which the Government was willing to part with its title to the land, and at which the land usually sold, provided each and every sitio contained permanent running water, was only sixty dollars per sitio.

(*b.*) The law officer of the Government whose duty it was to examine the expediente or record of the proceedings of the survey, appraisement, and sale must be presumed to have seen and known that the tract of land appropriated and severed from the public domain by the survey and sale and delivery of possession to the grantee, contained at least sixteen sitios.

GRANT NOT VOID ON ITS FACE.

THIS GRANT IS NOT VOID BECAUSE IT APPEARS ON THE FACE OF THE TITLE PAPERS THAT THE TRACT OF LAND CONVEYED CONTAINED AT LEAST SIXTEEN SITIOS, WHEREAS THE GRANTING OFFICER POSSESSED POWER TO GRANT ONLY FOUR SITIOS TO ONE PERSON.

"Under our form of government it is elementary that all power to reform a patent by officers of Land Department vanishes the moment the patent has been executed, and that ALL irregularities on the part of the officers intrusted with the preliminary proceedings are wiped out, and that for such irregularities PRIOR TO THE ACTUAL GRANT the government, and not the individual, must bear the consequences."

U. S. *vs.* Arredondo, 6 Peters, 751.

"The reason of this rule is that it is the grant and not the preliminaries, which passes legal title to the land."

Colson *vs.* Lewis, 2 Wheaton, 378.

"When power is given to subordinate officers, their action upon the premises is binding on the Government. The only question which can arise is power in the officer or fraud in the parties."

Belcher *vs.* Lynn, 24 Howard, 508.

"When the law has appointed a special tribunal to hear and determine certain matters arising in the course of its

duties, the decision of that tribunal, within the scope of its authority is conclusive upon all others."

Johnson *vs.* Townsley, 13 Wallace, 72.

The limitation was upon the power of the officer *to make the grant*—that is, to execute the title papers, and by that final and irrevocable act to divest the government of Mexico of its property.

All of the acts of the officers who had any duties to perform in the matter prior to that final act were subject to revision and review in Mexico, just as they are in this country under our system of disposing of the public lands, and a large discretion is vested there, as here, in the officer who performs the act of executing the final title. This is peculiarly true of the officer who executed the title in Mexico, because he was clothed with judicial power to reform and annul titles as well as to make them.

Two irregularities only occurred in the making of this grant, to wit: First, the fact that the petition was by one person, and that the tract surveyed and sold contained sixteen sitios; and, second, that the appraisers in appraising this tract believed that it contained only four sitios, and they therefore appraised only four sitios.

The first irregularity is obviously insignificant for the reason that the law did not prevent four or more persons from petitioning for the sale of sixteen sitios of land, and consequently no substantial injury resulted to the government from the fact that only one petitioned for the land, and that he only petitioned for four sitios, whereas sixteen sitios were actually surveyed and sold; provided it does not appear upon the face of the proceedings that the land was sold to less than four persons: because it must be presumed that the higher officers who had power to pass upon the validity of the sale became acquainted with the facts and approved the sale regardless of these irregularities, *because the Government incurred no substantial injury therefrom.* The title papers

show upon their face that the sale was made to Ramon Romero and the other residents of the presidio of Santa Cruz, and the evidence shows that the total number of grantees was twenty-one or twenty-two persons, and it must be presumed that the officers intrusted with the execution of the title papers and with the approval of the sale inquired into and knew these facts.

It is equally obvious that no substantial injury could have resulted to the government from the fact that only four sitios of the land were appraised, *because it appears from the face of the proceedings that the total price paid for the land amounted to $75 per sitio for sixteen sitios, whereas the best quality of land within the grant, to wit, that containing running water, was appraised at only sixty dollars per sitio,* and the proceedings further show upon the face thereof *that the appraisers examined the land in detail and found that it contained no land which was susceptible of irrigation.*

"If the officers of that department of the Government have acted within the general scope of their powers and without fraud, the patent which has issued after such proceedings must remain a valid instrument, and the court will not interfere unless there is such a gross mistake or violation of the law which confers their authority as to demand a cancellation of the instrument."

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured."

U. S. *vs.* Marshall Mining Co., 129 U. S., 588, 589.

The same principle was applied to a Mexican grant title by this court in the case of Hornsby *vs.* U. S., 10 Wall., 237.

"The general rule is, that when the acts of the officers of a foreign government are brought in question in our courts,

the acts performed by them will be presumed to have been within the scope of their lawful authority, unless the contrary appears."

Mott *vs.* Reys, 45 Cal., 379.

"The construction of their powers and of the laws which conferred them, adopted and acted upon by the authorities under the former government of the country, must be respected until it be shown that they have clearly transcended their powers or have acted manifestly in contravention of law;" and

"It would not be reasonable to suppose that the higher officials who acted in the execution of this grant did not have as enlightened views in respect to the true policy of the government, and as just an appreciation of their powers and duties as we possess in respect to them."

Hancock *vs.* McKinly, 7 Texas, 443.
De Lassus *vs.* U. S., 9 Pet., 134.
U. S. *vs.* Clark, 8 Pet., 452.
Strother *vs.* Lucas, 12 Pet., 438.

"The acts of public officers in disposing of public lands under color or claim of authority are evidence thereof until the contrary appears by the showing of those who oppose the title set up under it and deny the power by which it is professed to be granted. Without the recognition of this principle, there would be no safety in title papers, and no security for the enjoyment of property under them."

U. S. *vs.* Arredondo, 6 Pet., 728.

In the case at bar the sale was consummated in January, 1822, and the money was paid to the proper Government officer by the grantees at that time. The proceedings were approved at that time by the attorney general, the treasurer, the auditor, and the governor. Title was issued on May 15, 1825, by Riesgo, who occupied the high and important office of commissario general, and possessed extensive general powers in relation to sales of land. In 1831 the grantees were called upon to pay an additional sum of fifty dollars as fees for the preparation of the title papers, and were no-

tified to take them out of the office of the treasurer general, to whom they had been intrusted for delivery to the grantees by Riesgo.

All these officers had important duties to perform, and the power of the officer to make grants of land having been once established, every presumption must be that the officer acted in conformity with the law as known at that time, and not in violation of it.

Gonzales *vs.* Ross, 120 U. S., 616.
Hanrick *vs.* Jackson, 55 Tex., 17.

The Alamo de Sevilla grant called for four sitios only, and the survey upon its face included sixteen sitios, as in this grant, and in the year 1885 it was recognized as valid by the Mexican government, and the grantee was allowed to retain all the excess, which was almost as great as it is in this grant (Rec., p. 97).

The second irregularity is that the tract of sixteen sitios was *appraised* upon the theory that it only contained four sitios; but it is apparent from the face of the proceedings that the government of Mexico suffered no substantial injury by reason of this defect, because the best land within the grant was appraised at only sixty dollars per sitio, and the amount paid for the grant exceeded the rate of seventy-five dollars per sitio for all the land apparently contained within the survey.

In the case of Ainsa *vs.* U. S., 171 U. S., the promotor fiscal (attorney general) found fault with the calculation of quantity, and required an additional price to be paid by the grantee for a fraction of a sitio, so that the government would get its *minimum* price for that quantity of land at least.

In this case if Riesgo, the high officer who issued the title four years after the sale, had not seen that the price was at the rate of $75 per sitio, or more than the highest legal rate for the entire 16 sitios which the survey disclosed within the grant, and

had not seen that the number of purchasers or grantees was more than one person for every four sitios of land, we must presume he would have disapproved the sale, as was his duty, and would have ordered a resurvey, and hence those irregularities are cured by his act in issuing the title three years afterwards.

If Riesgo had declined to approve the sale because the survey and grant included 16 sitios, whereas only four sitios had been petitioned for and appraised, and because only one person petitioned for the sale, and that hence it was irregular for the granting officer to sell more than four sitios, or because the action of the granting officer in doing so was void on this latter ground, it would have been his duty to order a resurvey for the four sitios, and to refund to the purchaser the just value of the 12 sitios thus to be deducted from the survey. *Will the United States do less?*

Counsel for the Government have cited a case at page 163 of their main brief which establishes the foregoing contention. They say:

"In that case the proceedings were initiated on March 29, 1813, and went through various official channels, until they reached the viceroy at Mexico in 1816. On November 22, 1816, the viceroy referred the expediente to the attorney of the royal treasury. On December 31, 1816, the attorney recommended that the expediente be approved for four sitios instead of five, as the amount of land was limited to *four sitios for one person*, and husband and wife were one person. This expediente further shows that proceedings were thereupon had to segregate the four sitios from the original five, *and pay back the value of the one rejected.*"

Romero bid for this grant believing that it contained all the land within its boundaries. Will the United States refund the value of the 31 sitios of which its counsel seek to deprive us? Has this court power to so decree? We think it has as much authority to do that in this proceeding as to reform the title.

Hence, we must conclude that, even if VOIDABLE for any reason, the grant is certainly NOT VOID on account of anything which appears upon the face of the proceedings.

LAW OF 1835 A LEGISLATIVE GRANT.

See Appendix (page 101).

MOREOVER, THE LAW OF THE STATE OF SONORA OF MAY 12, 1835, IS CLEARLY A LEGISLATIVE GRANT, AND IT CONFIRMED AND VALIDATED THIS GRANT TO THE BOUNDARIES DESCRIBED IN THE TITLE PAPERS AND CURED ANY IRREGULARITIES WHICH MAY HAVE OCCURRED IN THE MAKING THEREOF.

No particular words or form of words are necessary to effect a legislative grant or a legislative confirmation of a grant already in existence. The intent of the legislature must be controlling and the act must be liberally construed. A legislative grant or confirmation is sufficient to pass the title to the grantee, and the subsequent issue and delivery of a patent is only evidence of a previous grant which took effect *in presenti* and which did not require the delivery of a patent in order to pass the title to the grantee.

Morrow *vs.* Whitney, 5 Otto, 551.
Langdeau *vs.* Haynes, 21 Wallace, 521.

The effect of the law of 1835 was to waive the right of the State to reform the title in any event and to limit its rights to conform to those between individuals—that is, to the right to recover the equitable balance of purchase price or to defeat the grant if such balance was not paid by the grantee upon demand—

EXCEPT ONLY THAT THE GOVERNMENT COULD STILL HAVE THE TITLE REFORMED IN A PROPER JUDICIAL PROCEDURE, IF, IN THE OPINION OF THE GOVERNMENT OFFICERS, THE AMOUNT OF SURPLUS WAS "VERY EXCESSIVE."

This law was enacted by the State of Sonora for the purpose of stopping the serious contentions then going on between persons in possession of grants containing excesses, who claimed that they owned the grant to the boundaries, and other persons who disputed their ownership and insisted upon the right to acquire a part of the grant on account of the alleged excess which existed within it. This fact is

proven by the letter written by Mendoza in 1839 and hereinbefore quoted in full.

This law of Sonora is in line with the decisions under the ancient laws of Virginia, which authorized other persons to acquire the surplus lands within a grant (see Taylor *vs.* Brown, 8 Cranch, 251), and under this law every grantee was protected in his right of property over all the land within the boundaries of his grant as against the whole world until, after a judicial proceeding instituted for that express purpose, it had been ascertained that an excess existed in the grant, and even then the grantee had the right to retain the whole of his property, and was under no obligation, except that of paying an additional price for the land at the rate which prevailed at the time of the appraisement.

In other words, this law confirmed the grantee in his title to the entire tract and established by legislative enactment the same reciprocal rights and duties between the government and the grantee which, as we have seen, existed in Mexico between an individual seller and an individual purchaser.

At the most, the obligation on the part of the grantee to pay an additional price *when an excess shall be ascertained to exist in the grant* was a condition subsequent, and conditions subsequent are not favored in law, and *the right to sue for forfeiture of a condition subsequent is not alienable*, and the United States did not acquire such right, therefore, under the treaty.

Davis *vs.* Gray, 16 Wall., 203.

Conditions for the payment of money to the grantor are generally construed to be conditions subsequent.

Weinreich *vs.* Weinreich, 18 Mo. App., 370.

Drew *vs.* Baldwin, 38 Wis., 529.

Am. & Eng. Ency. of Law (2 ed.), vol. 6, page 503, note 5.

Conditions of forfeiture in grants must be raised by express terms or clear explanation, and must be construed strictly.

See Brown *vs.* State, 5 Col., 496.
U. S. *vs.* Arredondo, 6 Peters, 743.

Counsel for the Government point to subsection 8 of section 13 of the act creating this court, which provides that "no concession, grant or other authority *to acquire* land made "upon a condition or requirement, either antecedent or subsequent, shall be admitted or confirmed, unless either such "condition or requirement was performed *within the time and* "*manner* stated in such concession, grant or other authority "*to acquire* land."

The time at which the condition subsequent in this case was to be performed had never arrived prior to the Gadsden treaty; and, if that condition followed the land into the United States, the time had never arrived until the trial of the case in this court, and at that time the owner of the grant duly offered to perform the condition in the manner stated in the law imposing it.

But, in my humble opinion, the law quoted has no bearing upon this case. This is not a grant "*to acquire* land," but it is a *perfect* grant under which land *was acquired. The performance of the condition subsequent was not necessary in order to vest title*, but its non-performance made the title subject to be divested upon a determination of that fact by the proper judicial procedure. *A complete and perfect legal title was vested in the grantee by the grant, and it could only be divested by a judicial act.* The Cessna case has no possible bearing upon the question, and I cannot conceive that counsel for the Government expect to be taken seriously in presenting it.

WHEN A LAW IS IN ITS NATURE A CONTRACT, AND ABSOLUTE RIGHTS HAVE VESTED UNDER IT, THE LAW CANNOT BE REPEALED.

Terrett *et al. vs.* Taylor, 9 Cranch, 44.

No new or additional consideration is required to support a ratification or a confirmation.

Drakeley *vs.* Gregg, 8 Wallace, 242.

Hence the right to retain all the land within the boundaries vested in the grantee in 1835, and that right could not be divested by anything short of a judicial procedure, because it vested the title to all the land to the boundaries, and it requires a judicial proceeding to divest it, as was said by this court in the Camou case.

"This is true on the principle of natural justice, even in the absence of a constitutional provision against the power of the State to take the property of an individual without due process of law, or against its power to impair the obligation of a contract," says Chief Justice Marshall.

Fletcher *vs.* Peck, 6 Cranch, 177.

The law of 1852 had no effect upon the vested rights of the grantee, unless the grantee or his successor in interest had actually been dispossessed of that land under the law prior to the treaty.

AS A PLAIN, HUMAN, COMMON-SENSE PROPOSITION, THE GOVERNMENT OF MEXICO HAD NO MORAL OR EQUITABLE RIGHT TO REFORM THE TITLE TO THIS GRANT OR TO RECOVER ANY SURPLUS LAND WITHIN THE DESCRIBED BOUNDARIES OR ANY ADDITIONAL PRICE, because—

(*a.*) The parties bidding for the land undoubtedly understood and believed that it included all the land, and that specific tract of land within the natural landmarks and artificial monuments described in the title papers, and *they must be presumed to have bid the highest price which they considered* **ALL** *of that land worth.*

(*b.*) *The price paid by the purchaser amounted to more than the prevailing market price* usually paid at that period of time *for the entire quantity of land within the boundaries of this grant*, and amounted to more than the minimum

price which the government was willing to accept for the ENTIRE QUANTITY AND QUALITY OF LAND within the perimeter of this grant as described.

(c.) The unit of measurement for land in Mexico was 4,338.464 acres, and the price ordinarily received for land amounted to about two-tenths of a mill per acre. The price for dry land was ten dollars per sitio. This tract contains about thirty-five sitios, and not more than seven of those sitios contain running water, and upon not to exceed three of them can water be obtained by wells. The entire tract is a high plateau, being at an elevation of about 4,500 feet above the sea level. The remaining twenty-seven sitios are "dry" sitios. Hence we have seven sitios at sixty dollars, amounting to $420; three sitios at thirty dollars, amounting to $90, and twenty-five sitios at ten dollars, amounting to $250, thus making the total value of the tract of land at the minimum price which the government was willing to accept, and at the usual price at which such lands were sold in that vicinity at that period of time, just $760, whereas the price bid and paid was $1,200, or about 60 per cent. above the prevailing market price of and the value fixed by law for the ENTIRE QUANTITY OF LAND WITHIN THE PERIMETER OF THIS GRANT.

It must be apparent that if the tract had been divided into nine tracts of four sitios each, and had been sold at nine separate public auctions, it would not have produced as much money as it did when sold in one tract, because cattle cannot travel more than three or four miles in that country to and from water; and the water is not located upon this grant, so that the aggregate value of the separate tracts would have been equal to the value of the single tract containing all the land; for this reason and for the further reason that, owing to the altitude, cattle cannot do well there unless they can retire to the protection of the foot-hills and mountains in the winter for feed as well as warmth.

It must not be forgotten that there is practically not a single acre of agricultural land within the perimeter of this grant.

That quality and character of land usually sold at the minimum price of sixty dollars per sitio for land containing permanent running water and thirty dollars for land upon which water could be obtained by wells (and this meant wells which could be dug under the facilities existing at that period of time and in that country) and ten dollars per sitio for dry lands, such as the greater portion of the lands are within the perimeter of this grant.

The Sonoita grant (Ely case) purporting to contain one and three-quarters sitios, containing running water, and the greater portion of which was, and is, agricultural land, and the running water upon which is amply sufficient for irrigation purposes, and which purposes were known and utilized in those days, was appraised and sold at sixty dollars for each sitio. It lies immediately northwest of this grant and is almost contiguous, and was sold about the same date.

The San Rafael de la Valle grant lies a short distance east from this grant and purports to contain four sitios, each of which has running water and was appraised and sold at sixty dollars for each sitio, or $240.

The Babacomari (Perrin case) lies immediately north of and almost contiguous to this grant and purports to contain six sitios with running water on each, appraised at sixty dollars each, and two dry sitios, appraised at ten dollars each, making a total of $380, *and was sold at that sum at a date subsequent to the sale of this grant.*

The government of Mexico exacted OCCUPATION of the land by the purchaser, and before passing the title to him it invariably required PROOF that he had the means to stock it, and thus to occupy it, before the sale to him would be approved. The REASON for imposing this condition must necessarily have been that the government desired to settle its frontier and to extend its civilization to the uttermost limits of its territory. Many persons could pay the usual

price of about two hundred dollars for a cattle ranch of four sitios of land, whereas the cost of stocking such a ranch must have amounted to several thousands of dollars, even in those days. The testimony shows that more than twenty thousand head of cattle were placed upon this grant by the original grantees, and the record shows that there must have been some rule or regulation of the Land Department which required improvements in the way of buildings to be placed upon the ground. (See Romero's letter, Rec., p. —.)

The object of the government was to furnish a barrier on the frontier against the "common ENEMY," as he was called—the Apache Indians.

Thus a part of the consideration to be paid was not only the POSSIBLE, but the PROBABLE, loss of stock and of life which would ensue from the occupation of the grant by attacks from Indians who made raids, not in couples, but in bands of from five hundred to one thousand or more, and who attacked and wiped out whole towns, as was the case with the presidio of Santa Cruz when it was located about fifty miles north of this grant, and even subsequently, when it was located about six miles south of the southern extremity of this grant.

Practically the entire stock of the original owners of this grant, amounting to over twenty thousand head of cattle, was killed or driven off by the Apache Indians.

THE PENALTY FOR A FAILURE TO OCCUPY THE GRANT FOR THE SHORT PERIOD OF ONE YEAR WAS A RIGHT IN THE GOVERNMENT OF MEXICO TO FORFEIT THE TITLE OF THE GRANTEE BY A JUDICIAL PROCEEDING FOR THAT PURPOSE. AND THE WHOLE OF THE LAND WAS OPEN TO DENOUNCEMENT BY PRIVATE PERSONS UPON THIS GROUND AS VACANT PUBLIC LANDS.

AND YET IT IS URGED BY COUNSEL FOR THIS GREAT GOVERNMENT THAT IT WOULD BE IN ACCORDANCE WITH GOOD MORALS AND EQUITY FOR THIS GOVERNMENT, AT THIS LATE DAY, TO GIVE TO THE OWNER OF THIS GRANT ONLY THE

QUANTITY OF LAND SPECIFIED IN THE TITLE PAPERS, AND TO GIVE HIM THAT QUANTITY ONLY PROVIDED THE ORIGINAL CENTER CAN BE DISCOVERED UPON WHICH TO FASTEN IT, AND ALTHOUGH BY MEASURING FROM THAT CENTER THE GRANTEE MIGHT SECURE ALL DRY LAND WHICH IS OF NO POSSIBLE VALUE FOR AGRICULTURAL, GRAZING, OR ANY OTHER PURPOSE; WHEREAS THE ORIGINAL GRANTEE MADE HIS BID AND PAID HIS MONEY UPON THE BELIEF AND UNDERSTANDING THAT HE WAS PURCHASING PERMANENT RUNNING WATER IN PLACES WHICH CONTROLLED LARGE AREAS OF SURROUNDING LAND FOR GRAZING PURPOSES.

The Mexican government enjoined its officers in the title paper to protect the grantee in his possession of the tract of land according to the BOUNDARIES SET FORTH AND DESCRIBED, and it enjoined the grantee to maintain monuments of mortar and stone at the points specified in said title papers as constituting such boundaries; and the Mexican government did protect the grantee in his possession of the entire tract of land to said boundaries as long as it maintained dominion over that part of the country, to wit, until the Gadsden treaty.

The United States has placed the grantee upon a par with every squatter upon the grant. The principle of law upon which alone it has protected the owner of the grant is that of POSSESSIO PEDIS, and it has accorded to every squatter upon the grant the same measure of protection and upon the same principle of law, although he located upon the same with full knowledge of the fact that it was owned and claimed as a Mexican grant, and even if he seized possession of the land surrounding the well-known center of the grant at no earlier a period than yesterday. It has exacted of him no taxes for his possession, while exacting of the grantee taxes upon the entire area of land within the perimeter of his grant, at the peril of losing *all* unless he paid the same, *although he was deprived of all the essential elements of ownership of property*, to wit, the exclusive

possession thereof. Hence for a period of nearly half a century every shotgun squatter has received equal recognition under the law with the real owner, who bought and paid for the land nearly a century ago, and who maintained possession at an enormous sacrifice of life and money long prior to the advent of these squatter sovereigns.

In the case at bar the sale was for a fixed price and lump sum, to wit, THE HIGHEST PRICE BID AT THE PUBLIC AUCTION SALE FOR THE TRACT OF LAND *supposed to contain four sitios of land which had been surveyed* in favor of Bustillo and which the intending purchaser or bidder could identify and ascertain the boundaries of prior to the auction sale by examining the expediente or proceedings of survey, and the law expressly required previous notice of the sale and thirty successive auctions on thirty successive days *in the vicinity of the land*, so that intending bidders could acquaint themselves in this manner with the extent and character of the land which the government intended to sell, and could regulate their bids accordingly.

At the public auction sale no price per sitio was suggested *except for the purpose of explaining the quality of the land.* The prior appraisement had been made for the protection of the government and for the sole purpose of determining the minimum price as a lump sum which the government would be willing to accept *for the tract of land so surveyed in favor of Bustillo* and *as described by natural landmarks and artificial monuments in said expediente.* The bid which secured the land *was a lump sum* of $1,200 for THE TRACT AS SURVEYED IN FAVOR OF BUSTILLO, and the patent or titulo recites that the sale was made of the tract as surveyed in favor of Bustillo *and for this lump sum.*

There was never any judicial adjudication that this San Rafael de la Zanja grant contains any excess or surplus within its perimeter, *i. e.*, within the natural landmarks and artificial monuments described in the title paper, by any officer clothed with the judicial power to try and determine

that question in Mexico prior to the date of the Gadsden treaty. The grantee and his successors in interest never had any duty imposed upon them by any law of Spain, Mexico, or Sonora to take any step to have the question of the existence or non-existence of such excess or surplus determined, and it is not shown that they ever had any knowledge prior to the Gadsden treaty of its existence.

Under the law of the State of Sonora of May 12, 1835, the duty rested upon the government officials (if anywhere) and not upon the grantee or his successors in interest to institute the necessary proceedings to ascertain the existence or non-existence of any excess in the grant for the purpose of divesting the title to the same, which had vested in the grantee, or for the purpose of recovering any additional price for such excess, if the same was found to be due to the government under the universal rule of equity then existing in Spain and Mexico, as well as in England and the United States, as between individuals, to wit, "the just price of the excess at the time of the sale;" or, in other words, as is stated in said law, "at the price that governed when it was surveyed and appraised;" or, in other words, at the price fixed by law as the minimum price for that quality of land.

We submit that under any just construction of this law the additional price which the government might have the right to recover would be determined by appraising the entire tract of land according to its quality at the prices per sitio fixed as a minimum by the laws of Mexico at that time, to wit, sixty dollars for a sitio containing running water, and thirty dollars for a sitio upon which water could be obtained by wells (that is, the class of shallow wells which it was practicable to dig at that day in that section of the country, which was the outermost limit of civilization in Mexico), and ten dollars per sitio for dry land, such as the evidence shows the great majority of this land to be; and by deducting from that total amount, which in this

case would not exceed $760 (to wit, seven sitios at sixty dollars, amounting to $420; three sitios at thirty dollars, amounting to $90; and twenty-five sitios at ten dollars, amounting to $250; or a total of thirty-five sitios, amounting to a total price of $760), the amount which was paid by the purchaser for the land (and which in this case was the sum of $1,200). It will thus be seen that the government of Mexico received the full price of all the land contained within the perimeter of this grant and about 60 per cent. of such just price in addition thereto; and hence if the case was one between individuals, *in which quantity was of the essence of the contract* and in which neither the purchaser nor the seller was estopped by recitals in the conveyance which required the application of certain rules of law, *the seller would not have the right to recover any additional price from the purchaser* upon any recognized principle of equity or under the statutory laws of Mexico as cited from Hall's Mexican Laws, *supra*, BECAUSE, while it may be apparent from the evidence that the total quantity of land is greatly in excess of the quantity which the seller *supposed* was contained within the boundaries of the grant, *it is equally apparent that the purchaser was deceived by such boundaries into paying a price or lump sum for the tract which is still more greatly in excess of the value of all the lands within the boundaries of the grant at the prevailing market value, as well as at the rate fixed by law.*

Location of Boundaries.

As this brief has already become unusually long, owing to our efforts to answer all the points suggested by counsel for the Government, and those indicated by the court during the oral argument, and as this court may not care to pass upon the question of the location of the boundaries, provided it decides the questions of law involved in the case in favor of the claimants, we will take the liberty of

discussing the evidence in relation to the boundaries of the grant in a separate brief. We understand that it has been the practice of this court, in the other Arizona grant cases, to send the case back to the trial court for the location of the boundaries in accordance with this court's opinion on the law of the case; and we presume that this court will prefer to pursue the same course in this case.

Respectfully submitted.

JOHN W. GRIGGS,
FRANCIS J. HENEY,
Attorneys for Claimants Colin Cameron and Harvey L. Christie.

APPENDIX.

Law No. 51, of May 12, 1835, of the State of Sonora is as follows:

"ARTICLE 1. Those who have acquired property in lands of the State by lawful title are owners in good faith even when they have lost that document, for they are entitled to revalidate it upon proof of the incident that may have occurred.

"ARTICLE 2. Those are likewise *bona fide* owners who, under the description given in their records of survey, occupy some excess of land; and they are entitled to such excess, even after such excess is shown, without any other requirement than that of paying for the excess in accordance with the quality of the land at the price which prevailed when the land was measured and appraised, and only in case the owner does not want the excess, or when such excess is very great in the opinion of the government, upon the report of the treasurer, shall such excess be awarded to any one denouncing or soliciting it; and such person shall bear the expense of the resurvey if excess has not been ascertained. In lands measured by calculation none shall be regarded as excess that does not exceed half a sitio."

NOTE.—The foregoing is the official translation, made expressly for this court and adopted by it in the case of Ainsa *vs.* U. S., 161 U. S., 225.